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No. 02-

IN THE

# Supreme Court of the United States

WORLD WIDE MINERALS LTD., WORLD WIDE RESOURCE FINANCE INC., KAZURAN CORPORATION, and NUCLEAR FUEL RESOURCES CORPORATION,

*Petitioners,*

*v.*

THE REPUBLIC OF KAZAKHSTAN, THE STATE COMMITTEE OF THE REPUBLIC OF KAZAKHSTAN ON THE MANAGEMENT OF STATE PROPERTY, and THE NATIONAL ATOMIC COMPANY KAZATOMPROM,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

ANSON M. KELLER
*Counsel of Record*
MARSHALL LEE MILLER
BAISE & MILLER, P.C.
*Attorneys for Petitioners*
1020 19th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 331-9100

177100

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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## QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that there was no waiver of sovereign immunity by Kazakhstan under the Foreign Sovereign Immunities Act 28 U.S.C. §§ 1330 and 1602 *et seq.* ("FSIA"):

   a. when Kazakhstan had entered into a commercial venture with petitioners that was implemented by a series of four interrelated, purely commercial contracts, each of which refers to the other,

   b. two of the contracts contain a clear written waiver of sovereign immunity, and

   c. the finding of waiver by the district court was not contested on appeal.

In other words, did the court of appeals err in holding that ***every*** document in a commercial venture has to contain the written waiver.

2. Whether the court of appeals erred in refusing to apply the commercial activity exception of the FSIA to this case.

3. Whether the court of appeals erred in holding that when a foreign sovereign specifically waives by contract its sovereign immunity to regulate the export of a natural resource except for some auxiliary, administrative tasks, can it escape liability in breaching that contract by claiming the Act of State Doctrine.

4. Whether the court of appeals erred in holding that a foreign sovereign, which clearly waives its sovereign immunity and engages in commercial activity, can then hide behind the Act of State Doctrine insofar as acts of state are concerned and when such acts are not public but indeed private and commercial.

## PARTIES TO THE PROCEEDING

1. Petitioners are the appellants in the court of appeals: World Wide Minerals Ltd., World Wide Resource Finance Inc., KazUran Corporation, and Nuclear Fuel Resources Corporation, a Colorado corporation.

2. Respondents are the Republic of Kazakhstan, the State Committee of the Republic of Kazakhstan on the Management of State Property, and the National Atomic Company Kazatomprom. The State Committee of the Republic of Kazakhstan on the Management of State Property is not only an instrumentality of Kazakhstan but an actual part of the government of Kazakhstan, just as the United States Department of the Interior is part of the United States government. The National Atomic Company Kazatomprom, owned by the Kazakhstan government, was formed for the purpose of privatizing the Kazakhstan uranium industry. It is also an instrumentality of the Republic of Kazakhstan.

## STATEMENT PURSUANT TO RULE 29.6

The parent company of Petitioners, World Wide Resource Finance Inc., Kazuran Corporation, and Nuclear Fuel Resources Corporation, is Petitioner World Wide Minerals Ltd. Petitioner, World Wide Minerals Ltd., has no parent corporation. No publicly held company owns 10% or more of the stock of any Petitioner.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Parties to the Proceeding | ii |
| Statement Pursuant to Rule 29.6 | ii |
| Table of Contents | iii |
| Table of Cited Authorities | v |
| Table of Appendices | xi |
| Opinions Below | 1 |
| Statement of Jurisdiction | 1 |
| Statutory Provision Involved | 1 |
| Statement of the Case | 1 |
| Reasons for Granting the Petition | 4 |
| Improper Interpretation of the FSIA. | 4 |
| Improper use of The Act of State Doctrine. | 5 |
| I. The FSIA Was Improperly Applied. | 5 |

*Contents*


| | | *Page* |
|---|---|---|
| II. | The Act Of State Doctrine Does Not Extend To The Commercial Activity Of A Foreign Sovereign. | 6 |
| | A. The Act of State Doctrine. | 7 |
| | B. The Commercial Activity Exception to the Act of State Doctrine. *Dunhill v. Cuba*, 425 U.S. 682 (1976). | 8 |
| | C. The Enactment of FSIA. | 10 |
| | D. The Application of the Commercial Activities Exemption to this case by the various courts of appeals and district courts. | 14 |
| III. | In Any Event, Even If There Were Some Act Of State, It Was An Auxiliary, Facilitating Act Concerning A Private, Commercial Agreement And Therefore Not Subject To The Act Of State Doctrine. | 19 |
| | A. The Act of State Must be Public and Governmental Across the Board. | 19 |
| | B. In Any Event, When the "Act" Is Ancillary To the Core of the Activity, It Is Not Protected By the Act of State Doctrine. | 24 |
| Conclusion | | 29 |

## TABLE OF CITED AUTHORITIES


Page

**Cases:**

*Adler v. Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997) ..... 22

*Alfred Dunhill of London v. Cuba*, 425 U.S. 682 (1976) ..... 3, 7

*Alomang v. Freeport-McMoRan, Inc.*, 1996 WL 601431 (E.D. La. 1996) ..... 15, 17

*Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371 (5th Cir. 1980) ..... 16

*Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964) ..... 7

*Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat. 904 (1824) ..... 9

*Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396 (D.N.J. 1979) ..... 15, 17

*Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) ..... 16

*Drexel Burnham Lambert Group Inc. v. Committee of Receivers for A.W. Galadari*, 810 F. Supp. 1375 (S.D.N.Y. *reversed on other grounds*, 12 F.3d 317 (2d Cir. 1993)), *cert. denied*, 511 U.S. 1069, 114 S. Ct. 1644) ..... 17

*Cited Authorities*

*Page*

*Dunhill v. Cuba*, 425 U.S. 682 (1976) ..... *passim*

*Eckert Int'l, Inc. v. Gov't of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167 (E.D. Va. 1993), *aff'd*, 32 F.3d 77 (4th Cir. 1994) .....15, 16, 17

*Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *aff'd sub nom., W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990) .....14, 16

*Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981) .....27, 29

*Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982) ..... 27

*Grupo Protexa, S.A. v. All American Marine Slip*, 20 F.3d 1224 (3d Cir. 1994) ..... 16

*Honduras Aircraft Registry, Ltd. v. Government of Honduras*, 129 F.3d 543 (11th Cir. 1997) ..... 17

*Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977) .....14, 15

*Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343 (S.D. Texas 1989), *aff'd*, 954 F.2d 1061 (5th Cir. 1992) ..... 19

*Cited Authorities*

*Page*

*Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422 (6th Cir. 1984) ..... 17

*Kirkpatrick v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 110 S. Ct. 701 (1990) ..... 23

*McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir. 1985) ..... 15, 20

*Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879 (D.C. Cir. 1988) ..... 21

*MOL, Inc. v. Peoples Republic of Bangladesh*, 575 F. Supp. 79 (D.Or. 1983), *aff'd*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) .. 21

*MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) ..... 19, 28

*National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979) ..... 14, 15, 17, 24

*Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987) .. 3, 19, 22, 24, 25, 26

*Republic of Argentina et al. v. Weltover, Inc.*, 504 U.S. 607 (1992) ..... 13, 14, 21, 22, 23

*Cited Authorities*

*Page*

*Republic of the Phillippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. denied*, 481 U.S. 1048, 107 S. Ct. 2178 (1987) ..... 14, 15, 20, 21

*Sampson v. Fed. Republic of Germany*, 975 F. Supp. 1108 (N.D. Ill. 1997) ..... 15, 18

*Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981) ....22, 27, 28

*Tifa Ltd. v. Republic of Ghana*, 692 F. Supp. 393 (D.N.J. 1988) .....24, 27, 28

*Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985) ..... 27

*Underhill v. Hernandez*, 168 U.S. 250 (1897) ..... 7

*Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983) ..... 15

*Virtual Defense and Development International, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1 (D.D.C. 1999) ..... 17

*Walter Fuller Aircraft Sales, Inc. v. Republic of the Phillippines*, 965 F.2d 1375 (5th Cir. 1992) .... 16

*Cited Authorities*


| | Page |
|---|---|
| *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir.), *cert. denied*, 482 U.S. 906, 107 S. Ct. 2483, *reh. denied*, 483 U.S. 1040, 108 S. Ct. 10 (1987) | 16 |
| *Wolf v. Federal Republic of Germany*, 95 F.3d 536 (7th Cir. 1996) | 16 |
| *Wolf v. Federal Republic of Germany*, 1995 WL 263471 (N.D. Ill.) | 16 |
| **Statutes:** | |
| 15 U.S.C. § 1 *et seq.* | 1 |
| 15 U.S.C. § 15 | 1 |
| 18 U.S.C. § 1964(c) | 1 |
| 28 U.S.C. § 1330 | i, 1 |
| 28 U.S.C. § 1602 et seq. | i, 1, 3, 7, 10 |
| 28 U.S.C. § 1603(d) | 11 |
| 28 U.S.C. § 1604 | 11 |
| 28 U.S.C. § 1605(a)(2) | 11 |

*Cited Authorities*

*Page*

**Other Authorities:**

Michael J. Bazyler, Abolishing the Act of State Doctrine, 134 U. Pa. L. Rev. 325 ..... 22

H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6 (1976), U.S. Code Cong. & Admin. News 1976 ..... 12, 13

## TABLE OF APPENDICES

*Page*

Appendix A — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Dated August 2, 2002 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The District Of Columbia Dated September 27, 2000 ..... 30a

Appendix C — Statutes Involved ..... 51a

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

## OPINIONS BELOW

The court of appeals opinion is reported at 296 F.3d 1154. (1a-29a). The district court's opinion (per Royce Lamberth, D.J.) is published at 116 F. Supp. 98. (30a-50a).

## STATEMENT OF JURISDICTION

The decision of the court of appeals was entered on August 2, 2002.

## STATUTORY PROVISION INVOLVED

The provisions of the Foreign Sovereign Immunities Act 28 U.S.C. §§ 1330 and 1602 *et seq.* ("FSIA") are relevant to this petition and are reprinted in the Appendix at 51a-52a.

## STATEMENT OF THE CASE

This action claims fraudulent inducement, multiple breaches of multiple contracts, conversion, conspiracy, unlawful restraint of trade, tortious interference with contractual rights, and violations of RICO[1] and the Sherman and Clayton Acts[2], all arising out of a commercial activity by the Republic of Kazakhstan.

One single set of facts tincture this entire case. In response to overtures, agreements, and contracts by respondents ("Kazakhstan") in early summer of 1996, petitioners loaned over $30 million, including interest, to Kazakhstan to resuscitate, restore and manage, *inter alia*, the commercial Kazakhstan uranium industry. This also required providing life sustaining heating and other services for the 75,000 inhabitants of the

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1. Title IX of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1964(c).

2. 15 U.S.C. § 1 *et seq.* and 15 U.S.C. § 15 respectively.

nearby City of Stepnogorsk in the winter of 1996-97 which was done.

Yet the loans have never been paid back as Kazakhstan agreed to do. Neither have the interest and management fees been paid as agreed. And the profits from an agreed-upon joint venture between Kazakhstan and petitioners to market uranium internationally were never realized because Kazakhstan — after the investments had been made — claimed that several years before, in 1992, it had already granted another company, a New York corporation, the exclusive right to market uranium in the United States.

This exclusive contract was unknown to petitioners, because, as the district court found, the existence of this contract had been kept confidential throughout the course of events. (33a). Yet, Kazakhstan made a promise in writing, approved by the Cabinet of Ministers, to negotiate with petitioners an export license "in good faith". It also gave petitioners "most favored investor status", so that no one would have greater rights than petitioners, again approved by Kazakhstan's Cabinet of Ministers. Nevertheless, the New York broker, with no ability to process uranium ore, possessed a confidential contract requiring Kazakhstan to provide it a stated amount of uranium per year and granting it the exclusive right to sell Kazakhstan uranium in the United States which constitutes 50% of the world spot market for processed uranium.

It is clear that Kazakhstan knew from the beginning that it could never have been able to meet its contractual promises to petitioners. Petitioners allege that Kazakhstan fraudulently induced petitioners to invest in Kazakhstan and resuscitate and refurbish its uranium industry based on false statements that Kazakhstan would pay back the loans, with agreed-upon interest, pay management fees, and form a joint venture with petitioners to market the uranium "internationally" and enjoy a 50/50 split in the profits. Instead, after performing its end of the bargain, petitioners could only watch as the American brokerage

company took over petitioners' sales contracts with third parties and sold the rest of the uranium processed by petitioners, all with the approval and blessing of respondents.

These important facts — and the inherent injustice — were either overlooked or ignored by the district court except to say "this court cannot consider any of the claims against Kazakhstan or its instrumentalities due to the act of state doctrine." (39a). The district court believed that a sovereign state and its related businesses could ignore ***any*** contractual commercial relationship in ***any*** context at its choosing. The court of appeals affirmed but on "somewhat different grounds" (2a). The court of appeals stated:

> Although we agree that Kazakhstan waived sovereign immunity for some of World Wide's claims, we conclude that it did not waive immunity for all of the claims. As to those claims where there was no waiver, we affirm lack of subject matter jurisdiction. As to the remaining claims against Kazakhstan and one of its instrumentalities, we agree with the district court that the act of state doctrine is fatal to World Wide's suit.

2a-3a; 296 F.3d at 1156-57.

To sustain the opinions below invites and encourages "international hijacking" with impunity and rewrites and misapplies both the Foreign Sovereign Immunities Act of 1976 ("FSIA") (28 U.S.C. § 1602 *et seq.*) and the Act of State Doctrine as set forth by this Court in a four justice plurality in *Alfred Dunhill of London v. Cuba*, 425 U.S. 682 (1976) ("*Dunhill*") (then Mr. Justice Rehnquist participating, Mr. Antonin Scalia arguing for the proposition on behalf of the United States, and Mr. Justice Stevens abstaining). It also misapplies the opinion of then-Judge Ruth Bader Ginsberg in *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987) The opinions below are not the law. They are not common sense.

And it is terrible public policy that has the potential to shut down world trade and investment.

Besides ignoring the well-known commercial activities exception to both the FSIA and the Act of State Doctrine — terms which are treated as synonymous in this brief although the basis for FSIA is jurisdictional and the Act of State is judicial abstention — the court of appeals did not discuss the commercial contacts between the parties except in the context of the waiver provision found in the Pledge Agreement and Management Agreement. Yet the four basic contracts implementing the commercial venture (the Management Agreement, the Loan Agreement, the Pledge Agreement and the Strategic Alliance Agreement) all involved the same commercial activities of Kazakhstan as were involved in the discussions in the briefs concerning the Act of State Doctrine.

## REASONS FOR GRANTING THE PETITION

If ever there were a case of fraud exercised by a sovereign nation in the context of commercial activity, this is the case.

### Improper Interpretation of the FSIA.

First, as to jurisdiction pursuant to FSIA, the court of appeals was in error when it found that every document implementing the commercial activity had to contain a waiver of immunity even when some of the documents clearly contained such waivers and referred to the other documents. This counterintuitive point was never even raised by the Kazakhstan appellees. Second, the court of appeals then conveniently ignored the fact that Kazakhstan did not question the waiver on appeal so the commercial activity exception provided by FSIA was not at issue. Petitioners' entire brief dealt with the commercial activities of Kazakhstan in the context of the Act of State Doctrine and to say that petitioners' attorney "eschewed" that part of the FSIA — is a statement that is demonstrably untrue. (12a-13a).

**Improper use of The Act of State Doctrine.**

Third, the courts below were incorrect when they found that Kazakhstan was immunized from suit because the Act of State doctrine prevented recovery from a denial of an export license although Kazakhstan had promised to grant that license in return for money and other commercial activity. That doctrine was not applicable in this case because all of the acts of Kazakhstan fell within the commercial exception to the Act of State doctrine as enunciated by this Court in *Dunhill* and followed by some courts of appeals, heard by some courts of appeals but decided upon other grounds, and rejected by only one court of appeals (Eleventh Circuit). Petitioners do not here challenge the validity of any truly sovereign act. Moreover, if any of the acts were sovereign in nature, they were private, not public, ancillary to the core of the commercial activities, and entitled to no protection by the Act of State doctrine as Mr. Justice White stated in *Dunhill*.

## I.

## THE FSIA WAS IMPROPERLY APPLIED.

The court of appeals failed to recognize that the commercial venture in this case was a single commercial deal — it involved the resuscitation and development of the Kazakhstan uranium industry and the sale of the uranium internationally. A series of interrelated contracts was prepared. Two contained a clear written waiver. For example, the Pledge Agreement, which protected the Loan Agreement, stated:

> To the extent that the Grantor may in any jurisdiction claim for themselves or their Asserts immunity from suit . . . the Grantor hereby irrevocably agrees not to claim and hereby irrevocably waives such immunity for themselves and their Assets to the full extent permitted by the laws of such jurisdiction with the intent inter alia that the foregoing waiver of

> immunity shall have irrevocable effect for the purposes of the United States Foreign Sovereign Immunities Act of 1976 in any legal action or proceedings to which such Act applies.

The court of appeals in effect held that every single document and contracts involved in this commercial activity of Kazakhstan had to contain this waiver, although the Pledge Agreement was meaningless without the Loan Agreement to which it referred. Likewise, the Strategic Alliance Agreement relied upon the Management Agreement which clearly waived sovereign immunity. The disaggregation of the contractual relationship was, at best, disingenuous by the court of appeals. At worst, the logic could require looking separately at each section of each document. Petitioners submit that this would stand the FSIA on its head. *A fortiori*, no cases have been found supporting this narrow interpretation of waiver under the FSIA.

Finally, the court of appeals erred in finding that counsel for petitioners waived or eschewed the commercial activities except to sovereign immunity. This is incorrect. The commercial activities of Kazakhstan were clearly briefed as to the Act of State doctrine as well, the subject was never raised by the court's in the oral arguments.

Petitioners submit that the narrow reading of the waiver and commercial activities exceptions to sovereign immunity emasculates the intent and spirit of the FSIA.

## II.

## THE ACT OF STATE DOCTRINE DOES NOT EXTEND TO THE COMMERCIAL ACTIVITY OF A FOREIGN SOVEREIGN.

The courts below were in error when they said that the key issue was the validity of the denial of the export license. Indeed, petitioners' argument assumes the denial's validity. The courts

below did not discuss the applicability of the commercial activities exception to the Act of State doctrine or FSIA. Nor did the courts below discuss the fraud or the commercial contracts that are, *inter alia*, the heart of this litigation, namely the Management Agreement, the Loan Agreement, the Pledge Agreement, and Strategic Alliance Agreement. These are typical business agreements that do not involve sovereign powers. The overdue repayment of the commercial loans, the overdue interest, the unpaid management fees, and the unpaid profits from the joint venture are all standard commercial transactions that were never paid, as contractually promised. These commercial defaults and delinquencies were not acts of sovereignty nor did they have anything to do with Kazakhstan's refusal to issue an export license.

**A. The Act of State Doctrine.**

In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 416 (1964), this Court reiterated "[t]he classic American statement of the act of state doctrine":

> Every sovereign state is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory.

*Id.* at 416 quoting *Underhill v. Hernandez*, 168 U.S. 250, 253 (1897).

In 1976, two pivotal events occurred which altered the right to bring an action in the federal courts against a foreign sovereign. First was the decision of this Court in *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682 (May 24, 1976). Second was the enactment of the Foreign Sovereign Immunities Act ("FSIA") (28 U.S.C. § 1602 *et seq.*) effective October 21, 1976, which endorsed and codified the Court's decision.

**B. The Commercial Activity Exception to the Act of State Doctrine. *Dunhill v. Cuba*, 425 U.S. 682 (1976).**

In *Dunhill*, this Court set forth what is now known as the commercial activity exception to the Act of State doctrine. This Court held that the failure of Cuba to return to plaintiffs funds mistakenly paid by plaintiffs for cigars sold to plaintiffs by certain expropriated Cuban cigar businesses was not an "Act of State" precluding an affirmative judgment against Cuba on its commercial debts. Mr. Justice White, writing for a five member majority, stated that:

> No statute, decree, order, or resolution of the Cuban Government itself was offered in evidence indicating that Cuba had repudiated its obligations in general or any class thereof or that it had as a sovereign matter determined to confiscate the amounts due three foreign importers.

*Id.* at 695.

Mr. Justice White then stated for a four member plurality (including then Mr. Justice Rehnquist, excluding Mr. Justice Stevens) and argued by Mr. Antonin Scalia that even if there had been a governmental statute or decree, it would have arisen in a commercial context and therefore was not an Act of State that would prevent jurisdiction in the federal courts. Specifically, Mr. Justice White stated:

> If we assume with the Court of Appeals that the Cuban Government itself had purported to exercise sovereign power to confiscate the mistaken payments belonging to three foreign creditors and to repudiate [Cuba's] adjudicated obligation to return those funds, we are nevertheless persuaded by the arguments of petitioner and by those of the United States that the concept of an act of state should not be extended to include the repudiation of a purely commercial

> obligation owed by a foreign sovereign or by one of its commercial instrumentalities.

*Id.* at 695.

This is a strong statement, but Mr. Justice White explained that the distinction "between the public and governmental acts of sovereign states on the one hand and their private and commercial acts on the other is not a novel approach." *Id.* In fact, the original State Department's recommendation for restricting the Act of State doctrine, the "Tate letter" of 1952, relied on this traditional distinction between *jure imperii* (public) acts and *jure gestionis* (private) acts of a sovereign. Mr. Justice White adopted this view, explaining that if the act is one created out of a commercial venture and not "public" in the sense that it is a governmental act applying to all of its citizens, the sovereign is not entitled to the Act of State doctrine. He stated:

> It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates, and to the business which is to be transacted.

*Id.* at 695-96, quoting *Bank of the United States v. Planters' Bank of Georgia*, 9 Wheat. 904, 907 (1824).

Mr. Justice White then explained that the Court agreed with the amicus brief filed by the U.S. Solicitor General (written by Mr. Antonin Scalia) and the letter from the Legal Adviser of the Department of State that "we do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial and not public, in nature" (omitting

footnotes). *Id.* at 696. Mr. Justice White then stated that "Cuba's debt to Dunhill arose out of the conduct by Cuba's agents of a commercial business for profit" (n.11) and held that the Act of State doctrine was inapplicable. *Id.* at 697 n.11.

Finally, it should be noted that Mr. Justice White, and all of the lower courts that have discussed the issue, explained the basis for the Act of State doctrine in the first instance, *viz*:

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudications involving the legality of acts of foreign states on their own soil *that might embarrass the Executive Branch of our Government* in the conduct of our foreign relations. . . . But based on the presently expressed views of those who conduct our relations with foreign countries, we are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch. On the contrary, for the reasons to which we now turn, we fear that embarrassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be recognized as an act of state and immunized from question in our courts.

*Id.* at 697-98. (Emphasis supplied).

**C. The Enactment of FSIA.**

The second event that occurred in 1976 was the enactment of FSIA, 28 U.S.C. § 1602 *et seq*. There, the Congress established a comprehensive framework for determining whether a court in this country may exercise jurisdiction over a foreign state. Under FSIA, a "foreign state shall be immune from the jurisdiction of the courts of the United States and of

the States" unless one of several statutorily defined exceptions applied. *Id.* at § 1604. One exception is when the foreign sovereign has expressly waived sovereign immunity, as Judge Lamberth already found in the present case.

Another exception is the "commercial activity" exception of § 1605(a)(2), derived from *Dunhill*, which provides that a foreign state is not immune from suit in any case:

> in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

*Id.* at § 1605(a)(2).

The term "commercial activity" is defined as:

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

*Id.* at § 1603(d).

In referring to the definition of commercial activity, the legislative history is important. There the Congress stated: "A 'regular course of commercial conduct'" includes the carrying on of a commercial enterprise such as **a mineral extraction company** . . ." (emphasis supplied.) The Congress also stated that "[a]s the definition indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial

nature of an activity of transaction that is critical." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. 6 (1976), U.S. Code Cong. & Admin. News 1976, p. 6604.

As to the section dealing with the "commercial activity" exception to sovereign immunity, Congress, in a footnote to the House Report, put its imprimatur on this Court's recent plurality view in *Dunhill*. The footnote states in its entirety:

> The committee has been advised that in some cases, after the defense of sovereign immunity has been denied or removed as an issue, the act of state doctrine may be improperly asserted in an effort to block litigation. Under the act of state doctrine, United States Courts may refuse to adjudicate the validity of **purely public acts of foreign sovereigns, as distinguished from commercial acts, committed and effective within their own territory.** For example, in the Supreme Court's recent decision in *Dunhill v. Republic of Cuba*, 44 U.S.L.W. 4665, No. 73-1288 (May 24, 1976), the respondent having brought suit (and thus clearly having waived the defense of sovereign immunity) attempted to assert that a refusal to pay a commercial obligation was not reviewable because it was an 'act of state'.
>
> The committee has found it unnecessary to address the act of state doctrine in this legislation since decisions such as that in the *Dunhill* case demonstrate that our courts already have considerable guidance enabling them to reject improper assertions of the act of state doctrine. For example, it appears that the doctrine would not apply to the cases covered by H.R.11315, whose touchstone is a concept of 'commercial activity' involving significant jurisdictional contacts with this

country. The conclusions of the committee are in concurrence with the position of the government in its amicus brief to the Supreme Court in the *Dunhill* case where the Solicitor General stated:

> '[U]nder the modern restrictive theory of sovereign immunity, a foreign state is not immune from suit on its commercial obligations. To elevate the foreign state's commercial acts to the protected status of 'acts of state' would frustrate this modern development by permitting sovereign immunity to enter through the back door, under the guise of the act of state doctrine.' (Amicus Brief of United States, p. 41, written by now M. Justice Scalia).

*Id.* at 6619. (Emphasis supplied).

By the time of the decision in *Republic of Argentina et al. v. Weltover, Inc.*, 504 U.S. 607 (1992), this entire Court appeared to accept the definition of the commercial activity exception to sovereign immunity as required by FSIA. Writing for a unanimous Court, Mr. Justice Scalia stated that Argentina unilaterally extended, by use of a Presidential Decree, the time for payment of official Argentina bonds and offered bondholders substitute instruments as a means of rescheduling the debts. The question was whether those actions by the country's President nevertheless fell within the FSIA commercial activity exception to sovereign immunity. Justice Scalia, after discussing *Dunhill's* plurality description of the restrictive theory of sovereign immunity, stated that:

> [w]e conclude that when a foreign government acts, not as a regulator of a market, but in the manner of a private player within it, the foreign sovereign's

> actions are "commercial" within the meaning of the FSIA.

*Id.* at 614.

**D. The Application of the Commercial Activities Exemption to this case by the various courts of appeals and district courts.**

In should be kept in mind that the instant case involves a purely "for profit" commercial venture to mine, process, and sell uranium. As part of the complaint there are claims for:

- The repayment of loans which Kazakhstan had agreed to pay.
- Interest on those loans which Kazakhstan had agreed to pay.
- Payment of management fees which Kazakhstan had agreed to pay.
- Profits from a joint venture Kazakhstan had agreed to join to sell uranium internationally.

Numerous federal courts have addressed the commercial activity exception to the Act of State doctrine and it is generally treated as the same under both FSIA and the Act of State doctrine although the basis for each is different (jurisdiction for FSIA and abstention for the Act of State Doctrine). *See, e.g., Republic of the Phillippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. denied*, 481 U.S. 1048 (1987); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984 (1977); *Nat'l Amer. Corp. v. Fed. Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979) (quoting *Dunhill* in that "the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation."); *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1988), *aff'd sub nom., W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400 (1990);

*Eckert Int'l, Inc. v. Gov't of Sovereign Democratic Republic of Fiji*, 834 F. Supp. 167 (E.D. Va. 1993), *aff'd*, 32 F.3d 77 (4th Cir. 1994) (stating that "[p]ublic and governmental acts of sovereign states, which are protected by the act of state doctrine, are distinct from states' private and commercial acts, which are not"); *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396 (D.N.J. 1979) (citing *Dunhill*, stating that "[t]he doctrine does not preclude me from considering the 'repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities'."); *Alomang v. Freeport-McMoRan, Inc.*, 1996 WL 601431 (E.D. La. 1996) (stating that the "act of state doctrine does not apply to the commercial activities of a foreign government"); *Sampson v. Fed. Republic of Germany*, 975 F. Supp. 1108 (N.D. Ill. 1997) (stating that "[t]he [act of state] doctrine, however, does not apply to the commercial activities of a sovereign State."). As the Eighth Circuit pointed out in *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir. 1985):

> FSIA recognizes that sovereign immunity . . . should be confined to a foreign sovereign's truly governmental acts and not extended to strictly commercial activities.

*Id.* at 347, citing to *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480 (1983).

To sum up, petitioners submit that guidance from this Court is needed in this area of the Act of State doctrine and the FSIA. At the Circuit Court level, the Second Circuit has embraced the commercial activity exception[3] as have the

3. *Republic of the Phillippines v. Marcos*, 806 F.2d 344 (2d Cir. 1986), *cert. denied*, 481 U.S. 1048, 107 S. Ct. 2178 (1987); *Hunt v. Mobil Oil Corp.*, 550 F.2d 68 (2d Cir.), *cert. denied*, 434 U.S. 984, 98 S. Ct. 608 (1977); *National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979)

Fifth[4] and Third Circuits[5]. Circuit Courts in the Fourth[6], Seventh[7], and Ninth[8] Circuits have heard cases involving the exception but have decided upon other grounds while acknowledging the exception and the possibility of endorsing it. Four circuits, namely the First, Eighth, Tenth, and the District of Columbia Circuits do not appear to have yet addressed the commercial activity exception to the Act of State at all except

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4. *Walter Fuller Aircraft Sales, Inc. v. Republic of the Phillippines*, 965 F.2d 1375, 1388 (5th Cir. 1992) ("Although public acts lurk in the background, the act of state doctrine 'does not preclude judicial resolution of all commercial consequences stemming from the occurrence . . . of public acts'."); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1381 (5th Cir. 1980) (the act of state doctrine "does not preclude judicial resolution of all commercial consequences stemming from the occurrence of such public acts"); *cf. Callejo v. Bancomer, S.A.*, 764 F.2d 1101 (5th Cir. 1985) (stating that since Mexico's actions were not commercial, there was no need to decide on the commercial activity exception).

5. *Environmental Tectonics v. W.S. Kirkpatrick, Inc.*, 847 F.2d 1052 (3d Cir. 1987), *aff'd sub nom. W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corporation, International*, 493 U.S. 400, 110 S. Ct. 701 (1990); *Grupo Protexa, S.A. v. All American Marine Slip*, 20 F.3d 1224 (3d Cir. 1994) ("sometimes, even though the validity of the act of a foreign sovereign within its own territory is called into question, the policies underlying the act of state doctrine may not justify its application.")

6. *Eckert Int'l, Inc. v. The Government of the Sovereign Democratic Republic of Fiji*, 32 F.3d 77 (4th Cir. 1994).

7. *Wolf v. Federal Republic of Germany*, 95 F.3d 536 (7th Cir. 1996) (affirming *Wolf v. Federal Republic of Germany*, 1995 WL 263471, (N.D. Ill.), which stated that "[w]hether such an exception actually exists has not been decided by the Court. Even if it does, it is not applicable here because, as we have held Germany's actions are not commercial.")

8. *West v. Multibanco Comermex, S.A.*, 807 F.2d 820 (9th Cir.) *cert. denied*, 482 U.S. 906, 107 S. Ct. 2483, *reh. denied*, 483 U.S. 1040, 108 S. Ct. 10 (1987) (stating, "[w]e do not need to reach that issue here").

in the case at bar. Only the Eleventh Circuit has rejected the exception[9] while the Sixth Circuit and, now, the D.C. Circuits have only questioned in dicta whether the *Dunhill* plurality is of "precedential value."[10]

On the district court level, the federal district courts have much more readily endorsed the commercial activity exception. District courts in the District of Columbia[11], Second[12], Third[13], Fourth[14], Fifth[15], and Seventh[16] Circuits have either explicitly

9. *Honduras Aircraft Registry, Ltd. v. Government of Honduras*, 129 F.3d 543 (11th Cir. 1997).

10. *Kalamazoo Spice Extraction Co. v. The Provisional Military Government of Socialist Ethiopia*, 729 F.2d 422, 425 n.3 (6th Cir. 1984).

11. *Virtual Defense and Development International, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1 (D.D.C. 1999).

12. *Drexel Burnham Lambert Group Inc. v. Committee of Receivers for A.W. Galadari*, 810 F. Supp. 1375 (S.D.N.Y. *reversed on other grounds*, 12 F.3d 317 (2d Cir. 1993)), *cert. denied*, 511 U.S. 1069, 114 S. Ct. 1644) (stating that consistent with the Supreme Court's holdings in *Dunhill*, "[t]he repudiation of the debts owned to [plaintiffs] in this case is therefore not an act of state"); *National American Corp. v. Federal Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979) ("the concept of an act of state should not be extended to include the repudiation of a purely commercial obligation.").

13. *Behring Int'l, Inc. v. Imperial Iranian Air Force*, 475 F. Supp. 396 (D.N.J. 1979) (*citing Dunhill*, stating that "[t]he doctrine does not preclude me from considering the "repudiation of a purely commercial obligation owed by a foreign sovereign or by one of its commercial instrumentalities.")

14. *Eckert Int'l, Inc. v. Fiji*, 834 F. Supp. 167 (E.D. Va. 1993), *aff'd supra*, (stating that [p]ublic and governmental acts of sovereign states, which are protected by the act of state doctrine, are distinct from states' private and commercial acts, which are not").

15. *Alomang v. Freeport-McMoRan, Inc.*, 1996 WL 601431 (E.D. La.) (stating that "act of state doctrine does not apply to the commercial activities of a foreign government"). (Cont'd)

or implicitly endorsed the commercial activity exception. Courts in the First, Eight and Tenth, and Sixth Circuits have not yet heard cases involving the commercial activity exception.

When Kazakhstan privatized its uranium industry, created private stockholder corporations, then borrowed money and engineering management talent, waived sovereign immunity not once but twice, and then entered into the interrelated commercial agreements such as the Loan Agreement, the Pledge Agreement, the Management Agreement, and the Strategic Alliance Agreement, it relinquished its sovereign status under the Act of State doctrine. As this Court stated in *Dunhill*, "there is nothing in U.S. law that calls on this Court to recognize as an Act of State the repudiation of obligations adjudicated in this Court as arising out of the operation of a commercial business by a sovereign or one of its instrumentalities." *Dunhill*, 425 U.S. at 704.

Simply put, the court below failed to recognize that the Act of State doctrine was not relevant to this case because no public official sovereign act of the government of Kazakhstan was needed to be declared valid or invalid as to the repayment of the loans, payment of the interest, payment of the management fees and payment of the loss of profits from the failed joint venture.

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16. *Sampson v. Federal Republic of Germany*, 975 F. Supp. 1108 (N.D. Ill. 1997) (stating that "[t]he [act of state] doctrine, however, does not apply to the commercial activities of a sovereign State.").

## III.

## IN ANY EVENT, EVEN IF THERE WERE SOME ACT OF STATE, IT WAS AN AUXILIARY, FACILITATING ACT CONCERNING A PRIVATE, COMMERCIAL AGREEMENT AND THEREFORE NOT SUBJECT TO THE ACT OF STATE DOCTRINE.

Petitioners recognize that a refusal to grant an export license in a sterilized setting has been considered an act of state which the federal courts will not review[17]. However, for at least two reasons, the courts of this country have drawn a distinction between public and governmental acts (*jure imperii*) on the one hand and private and commercial acts (*jure gestionis*) on the other. Moreover, this Court has stated that even if there is an act of state involved in commercial activity, a court should not focus "on auxiliary provisions rather than on the agreement's core to classify the contract at issue as 'governmental' rather than 'commercial'." *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543, 1548 (D.C. Cir. 1987).

### A. The Act of State Must be Public and Governmental Across the Board.

As Mr. Justice White stated in *Dunhill*:

> Distinguishing between the public and governmental acts of sovereign states on the one hand and their

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17. For example, we refer to the discussion *infra*, concerning *MOL, Inc. v Bangladesh*, 736 F.2d 1326 (9th Cir. 1984), *cert. denied*, 469 U.S. 1037 (1984). See, however, *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 347 (S.D. Texas 1989), *aff'd*, 954 F.2d 1061 (5th Cir. 1992). There the district court dismissed a FSIA action stating at 347: "A basic attribute of sovereignty is a nation's control over its mineral resources and, **short of actually selling these resources on the world market**, decisions and conduct concerning them are uniquely governmental in nature." (emphasis supplied).

> private and commercial acts on the other is not a novel approach.

425 U.S. at 695.

He further noted that, quoting from the amicus brief filed by Mr. Antonin Scalia, that the Department of State also agreed:

> [W]e do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial and not public, in nature. (omitting footnotes.)

*Id.* at 697 and 707.

The courts have repeatedly applied the public aspects of the requirements set forth in *Dunhill.* In *McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341 (8th Cir. 1985), the Eighth Circuit affirmed a judgment against Iran arising out of McDonnell Douglas' refusal to fill orders for spare parts for F-4 fighter planes. The Court held, *inter alia*, that, although the transaction involved fighter aircraft, the deal essentially involved sale of merchandise and therefore, Iran was not entitled to claim sovereign immunity because: "FSIA . . . should be confined to a foreign sovereign's truly governmental acts and not extended to strictly commercial activities." *Id.* at 348.

In the seminal case of *Republic of Philippines v. Marcos*, the Phillippines sought preliminary injunctions concerning certain real estate allegedly owned by the Marcos family, 806 F.2d 344 (2d Cir. 1986). The Marcoses raised the argument that the Act of State doctrine prohibited adjudication of the legality of the acts of a foreign head of state within his own country. The Second Circuit pointed out the difference between public acts and private acts. Public acts are those applied across the board. The Second Circuit stated:

> [T]hat the acts must be *public* acts of the sovereign has been repeatedly affirmed. *See Alfred Dunhill of*

> *London, Inc. v. Republic of Cuba*, 425 U.S. 682, 694 & n. 10 . . . (noting that in *Ricaud v. American Metal Co.*, 246 U.S. 304. . . . , *Oetjen*, *supra*, and *Underhill*, *supra*, the conduct "was the *public act* of those with authority to exercise sovereign powers" (emphasis added); . . . *Hunt v. Mobil Oil Corp.*, 550 F.2d 73 (2d Cir.) (underscoring that acts must be "public" and "governmental" for the doctrine to apply) . . .

*Id.* at 358.

In *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879 (D.C. Cir. 1988), Millen contracted with CCNAA, an instrumentality of Taiwan, for Millen to locate a shoe box manufacturing plant on Taiwan and import raw materials on a duty-free basis. CCNAA promised Millen only the benefit of existing Taiwanese law but warned this was subject to change. After building a plant, Taiwan issued a new regulation canceling duty-free treatment across the board for all such transactions. This was a public act, done for a sovereign purpose, not directed at a single commercial transaction or a single entity engaged in commercial activity with the sovereign. This Court found that the commercial activity exception to the FSIA was not applicable to such public activity.

Here, of course, we have private commercial activity in which Kazakhstan acted as a private party (*jure gestionis*) with petitioners over loans, management, reconstruction, and shipments of commodities. As this Court declared in *Westover*: "There is nothing distinctive about the state's assumption of debt (other than its purpose) that would cause it to be regarded as *jure imperii* . . .". 504 U.S. at 615.

The court below relied upon *MOL, Inc. v. Peoples Republic of Bangladesh*, 575 F. Supp. 79 (D.Or. 1983), *aff'd*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) to find that

the denial of an export license was an act of sovereignty.[18] But that is only the beginning, not the end, of the inquiry.

After all, while the instant case may involve a sovereign act, so did the Argentine President's decree in *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992) (government bond repayment delayed); and the most sovereign of all, a trade embargo ordered by the Nigerian government in *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981). Yet in each case the court looked beyond the threshold state involvement and assumed jurisdiction over the transaction as a whole.

That is because the courts recognized that most international business deals can involve governmental action in some form or another. As we discussed at length above, if the essence of the deal is the buying and selling of goods and services, courts do not relinquish jurisdiction merely because some governmental red tape or even disapproval is involved. *Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987).

Justice Scalia, speaking again for a unanimous Court, stated succinctly, "Act of state issues only arise when a court *must*

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18. *MOL* was a 1983 attempt by an Oregon district court to establish a "natural resources" exception to both the act of state and the evolving commercial activity exception to the FSIA. This effort found little endorsement except in its own circuit, 736 F.2d 1326 (9th Cir. 1984) and even there has been subsequently ignored or distinguished. *Adler v. Federal Republic of Nigeria*, 107 F.3d 720 (9th Cir. 1997) (even collecting taxes and issuing governmental decrees do not deprive a court of jurisdiction under FSIA those state activities are "in connection with" a commercial activity). MOL also exemplified the early efforts to devise what one commentator criticized as an unsuccessful "mechanical" system for determining the applicability of the act of state doctrine. Michael J. Bazyler, Abolishing the Act of State Doctrine, 134 U. Pa. L. Rev. 325 at footnotes 264 and 268.

*decide* — that is, when the outcome of the case turns upon — the effect of official action by a foreign sovereign. When the question is not in the case, neither is the act of state doctrine." *Kirkpatrick v. Environmental Tectonics Corp., Int'l*, 493 U.S. 400, 406, 110 S. Ct. 701, 705 (1990) (emphasis in original).

Here, petitioners did not challenge the export license denial. In fact, if there had been no export control process in Kazakhstan — as there almost was not[19] — the result would have been the same, because the long-denied, suddenly-revealed prior contract between Nukem and Kazakhstan *contractually* prevented the latter from honoring its obligations to WWM. Since the license is not in question, therefore, there is no necessity for the Court to consider the validity of the export license nor of the contract that underlay it. Therefore, under *Kirkpatrick*, the act of state defense is not applicable here.

Once a sovereign steps down from its throne and acts as a merchant, its private actions (*jure gestionis*) are deemed commercial and place it on the same footing as the private business with which it deals. *Dunhill*, 425 U.S. at 705-06, *Weltover*, 504 U.S. at 614. As such, it and its instrumentalities are acting as private persons and must bear the consequences of their actions just as any other commercial enterprise. Loans must be repaid and agreements honored. The courts should not give deference to an unseemly shuffle between the throne room and the marketplace.

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19. The Kazakhstan export control law of 1996 called for the creation of a system headed by an undefined "authorized central executive body" but a year later one still did not exist. "Concerning the Export Control of Armaments and Double Designation Production" of Kazakhstan, 18 June 1996, signed by Pres. N. Nazarbayev (296A-302A). WWM was therefore referred almost endlessly from one department to another with conflicting advice until finally told in the summer of 1997 that, procedures aside, no export license could be given because of the prior contract between Nukem and Kazakhstan.

**B. In Any Event, When the "Act" Is Ancillary To the Core of the Activity, It Is Not Protected By the Act of State Doctrine.**

When the act of a sovereign is ancillary or peripheral to the core of the activity of a deal, the Act of State doctrine does not apply. *See, e.g., Practical Concepts, Inc. v. Republic of Bolivia*, 811 F.2d 1543 (D.C. Cir. 1987); *National American Corp. v. Fed. Republic of Nigeria*, 448 F. Supp. 622 (S.D.N.Y. 1978), *aff'd*, 597 F.2d 314 (2d Cir. 1979); *Tifa Ltd. v. Republic of Ghana*, 692 F. Supp. 393 (D.N.J. 1988).

In *Practical Concepts*, the court of appeals was faced with a situation which involved a breach of a contract for designing and implementing a comprehensive program for the economic development of Bolivia's rural areas by Bolivia. The district court granted a motion to dismiss on the basis of sovereign immunity under FSIA. The court of appeals, through then-Judge Ruth Bader Ginsburg, reversed, on the basis that any sovereign act of Bolivia was auxiliary to the agreement's commercial core with PCI. She stated:

> Immunity applied, the district court reasoned, because the contract between Bolivia and PCI included "numerous terms which only a sovereign state could perform, and which no private firm or individual going into the market place could ever offer". . . . Denying PCI's motion for reconsideration, the district court stated: "Where, as here, a state exempts a private party from taxation, grants preferential bureaucratic treatment, and diplomatic privileges, it is acting in a sovereign [as distinguished from a commercial] capacity."

*Id.* at 1548.

She then stated:

> We think the district court misperceived the legislature's intention when the court focused

> on auxiliary provisions rather than on the agreement's core to classify the contract at issue as "governmental" rather than "commercial.: It is more sensible, and faithful to the probable intent of Congress, we believe, generally to center on the basic exchange (*e.g.*, the sale of goods or services), not on the facilitating features (*e.g.*, expediting entrance of personnel and supplies), in determining whether an obligation qualifies as a "commercial activity" for FSIA purposes.

*Id.*

Judge Ginsburg recognized that governmental approvals are involved sometimes in business transactions, so the inquiry must go further. She elaborated:

> The district court crystallized its own analysis by asking "Is the activity contemplated by [the PCI-Bolivia] contract activity 'in which a private person could engage?" . . . Not in all respects, the district judge pointed out, for the contract included terms only a government could perform . . . Those terms, PCI asserts and we agree, were "incidental" or auxiliary; they do not denote the essential character of the agreement.
>
> * * *
>
> Congress did indeed contemplate that courts would regard as key the question whether the foreign sovereign's contract at issue is "of the same character as a contract which might be made by a private person." . . . But the legislature, so far as we can tell, did not intend that the character of a contract would turn on its subsidiary rather than its central prescriptions. The essence of the Bolivia-PCI contract plainly was the exchange of money for

> advice on the development of rural areas. Prompt provision of documents to facilitate entry of material and personnel and tax exemptions to simplify PCI's receipt of payments from Bolivia, just as plainly, were auxiliary to the basic exchange. (footnotes omitted).

*Id.* at 1550.

Here we have an act that was auxiliary to the contracts between petitioners and Kazakhstan. The essence of the contracts was plainly the exchange of money and business talent for the development of Kazakhstan uranium mines and the sale of uranium ore internationally. Schedule 2 of the Management Agreement, which had been specifically approved by the Cabinet, states that the export license would be granted subject only to a review of three treaties so as not to violate them. Part 2.3 of Schedule 2 states:

> 2.3 **Uranium Marketing:** World Wide shall have obtained licenses from the Republic of Kazakhstan to permit World Wide to market freely internationally all processed uranium and uranium compounds produced or processed by World Wide or TGK, subject to controls imposed by the Republic of Kazakhstan over production in order to comply with the United Nations Nuclear Non-Proliferation Treaty, the Safeguards Guidelines of the International Atomic Energy Agency and other similar international treaties and agreements. Subject to the above, World Wide would be free to sell all product of the Property Complex at free world prices and to participate freely in the international spot and long term markets.

Thus, Kazakhstan had already waived any "sovereignty" concerning an export license except for the ministerial actions

to assure such license complied with certain treaties. Once waived, this clerical or administrative function could have been certified by anyone, such as a lawyer or private customs broker, not just a sovereign nation. By disregarding these repeated expressions of sovereign intent, the courts below did what they claim they were forbidden to do — adjudicate the validity of Kazakhstan's President and Cabinet of Ministers joint decision to waive.

As was reiterated in *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985), quoting *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1028 (D.C.Cir. 1982):

> [W]e think it ought to be difficult for defendants engaged in commercial activity with substantial American contact . . . to invoke successfully sovereign immunity when sued for underlying commercial misdeeds. This is especially so in view of the fact that FSIA was written in great measure to ensure that "our citizens will have access to the courts in order to resolve ordinary legal disputes.

*Id.* at 211.

Other courts have focused on the overall transaction as a whole rather than specific instances of ancillary government activity. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (2d Cir. 1981); *Gemini Shipping, Inc. v. Foreign Trade Organization for Chemicals and Foodstuffs*, 647 F.2d 317 (2d Cir. 1981); *Tifa Limited v. Republic of Ghana*, 692 F. Supp. 393 (D.N.J. 1988).

In *Tifa*, a New Jersey corporation brought an action against Ghana seeking to recover damages arising out of Ghana's failure to honor its obligations under a national pesticide project.

In denying Ghana's motion to dismiss, the court found Ghana's activities clearly fell within the FSIA jurisdiction. It stated:

> the governmental defendants contend the alleged contract was conditioned on the government of Ghana's exemption of import duties on the shipment and waiver of the cash margin required by the Bank of Ghana . . . Thus, the governmental defendants contend the relevant activity is governmental conduct and thus the commercial activity exception to the FSIA does not apply.[20]
>
> * * *
>
> Despite the defendants' arguments, the gravamen of Tifa's complaint is the foreign state defendants' alleged breach of the express or implied promise to pay for the chemicals and equipment which Tifa shipped to Ghana. Although standing alone the exemption from import duties and waiver of the mandatory cash margin appear to be governmental activities, these acts were ancillary to the alleged promise.

*Id.* at 401.

The court then explained that its conclusion was bolstered by the two cited cases. In *Texas Trading*, the government of Nigeria embargoed the shipments of concrete and issued orders regulating entry into Nigerian ports and unilaterally altered the letters of credit. The Second Circuit did not focus on these sovereign actions but held them to be ancillary activities by the Nigerian government as part of an overall commercial contract for the purchase of concrete.

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20. The Ghana defendants cited for this proposition *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984), which is dealt with *supra*.

In *Gemini Shipping*, an organization wholly owned by the government of Syria purchased rice from a private American corporation. Because of certain shipping problems, a related Syrian governmental organization "guaranteed" payment of the demurrage cost to the American corporation which shipped the goods. When the Syrian government organization refused to pay the demurrage, the shipping company brought an action in the Southern District of New York against the government organizations. The court reasoned: "The suit is 'based upon' commercial activity because the guarantee was part and parcel of the rice sale. While, in a narrow sense [the suit] might be said to be 'based upon' only the breach of the guarantee, the drafters of the FSIA intended no such niggardly construction." *Id.* at 319,

*A fortiori*, the failure to perform mere clerical duties in this case, resulting in the denial of an export license, was simply ancillary to the real commercial core of the transactions and in which Kazakhstan and its instrumentalities played an integral part.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ANSON M. KELLER
*Counsel of Record*
MARSHALL LEE MILLER
BAISE & MILLER, P.C.
*Attorneys for Petitioners*
1020 19th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 331-9100

# APPENDIX

## APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED AUGUST 2, 2002

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

**No. 00-7250.**

WORLD WIDE MINERALS, LTD., et al.,

Appellants,

v.

REPUBLIC OF KAZAKHSTAN, et al.,

Appellees.

Argued Nov. 8, 2001.
Decided Aug. 2, 2002.

ORDER

Before: GINSBURG, Chief Judge, ROGERS and GARLAND, *Circuit Judges.*

GARLAND, *Circuit Judge*:

In 1996 and 1997, World Wide Minerals Ltd., a Canadian corporation, entered into a series of agreements with the Republic of Kazakhstan. Pursuant to those agreements, World Wide took over the management of one of Kazakhstan's major uranium complexes and loaned Kazakhstan several million dollars to fund the restoration of the facility. World Wide contends that, in return, Kazakhstan agreed (inter alia)

to permit World Wide to export Kazakhstan uranium. World Wide alleges that Kazakhstan breached its agreements by failing to issue World Wide a uranium export license and by seizing its assets in Kazakhstan. World Wide further alleges fraudulent inducement, tortious interference, conversion, conspiracy, and violations of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*[1]

The defendants in this case are Kazakhstan and two of its instrumentalities, as well as Nukem, Inc., a New York corporation that World Wide contends conspired with Kazakhstan in committing wrongful acts against World Wide. The district court concluded that Kazakhstan and its instrumentalities had waived sovereign immunity against suit, and that the court therefore had jurisdiction over the claims against these defendants under the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1605(a)(1). The court nonetheless dismissed those claims pursuant to the act of state doctrine. The court also dismissed World Wide's claims against Nukem, holding that it did not have personal jurisdiction over that New York corporation because World Wide's injuries did not arise out of any act that took place in the District of Columbia.

We affirm the dismissal of World Wide's claims against the Kazakhstan entities, albeit on somewhat different grounds. Although we agree that Kazakhstan waived sovereign

1. Two of World Wide's subsidiaries (World Wide Resource Finance, Inc. and KazUran Corporation), as well as its sales agent (Nuclear Fuel Resources Corporation), are also plaintiffs in this case. For the sake of convenience, we refer to the plaintiffs collectively as World Wide.

immunity for some of World Wide's claims, we conclude that it did not waive immunity for all of the claims. As to those claims where there was no waiver, we affirm dismissal for lack of subject matter jurisdiction. As to the remaining claims against Kazakhstan and one of its instrumentalities, we agree with the district court that the act of state doctrine is fatal to World Wide's suit. This conclusion also removes any substantial federal question with respect to identical claims against the other instrumentality, a corporation wholly owned by Kazakhstan. Finally, because the dismissal of the claims against Nukem was based on a misunderstanding regarding the date upon which World Wide alleges that officials of Nukem and Kazakhstan met in the District of Columbia to conspire against it, we remand those claims to permit the district court to determine whether the facts are sufficient to establish personal jurisdiction.

I

In 1995, the Republic of Kazakhstan issued a decree announcing the privatization of the country's uranium industry and its intention to contract with foreign investors for the management of previously state-run facilities. Am. Compl. ¶ 40.[2] Shortly thereafter, World Wide submitted a proposal to take over the management of Tselinny Gorno-Khimicheskii Kombinat (TGK), a state holding company

2. The facts set out in this Part are taken from World Wide's amended complaint and documents incorporated by reference therein. Because we are reviewing the district court's decision on a motion to dismiss, we must assume that the allegations of the complaint are true, although many are disputed by the defendants. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 351, 113 S. Ct. 1471, 1474, 123 L. Ed. 2d 47 (1993).

that operated a uranium complex located in the area of Kazakhstan's Northern Mines. After a period of negotiation, the parties entered into the four agreements that are at issue in this case.

The first agreement was the Management Agreement. That agreement, signed by World Wide and the State Committee of the Republic of Kazakhstan on the Management of State Property (Kazakhstan State Committee) on October 7, 1996, granted World Wide the right to manage and control the assets of TGK. *Id.* ¶ 56; Management Agreement ¶ 2.11. In return, World Wide agreed to satisfy TGK's outstanding debts and to implement a restructuring program for the uranium complex. Management Agreement ¶¶ 2.11(b), 2.22. The agreement listed a number of additional points "which have not been concluded in this Agreement" but which were to be "addressed in good faith negotiations," including the granting of a license to World Wide to export TGK uranium for international sale. *Id.* ¶ 2.17, Sched. 2 ¶ 2.3. World Wide was entitled to terminate the agreement if Kazakhstan did not grant it the license by December 16, 1996. *Id.* ¶ 2.18. Although World Wide never received the license, it did not suspend performance under the contract until April 30, 1997. Am. Compl. ¶ 73.

On November 14, 1996, World Wide, the Kazakhstan State Committee, and TGK executed a second agreement, the Loan Agreement. Under that agreement, World Wide agreed to lend TGK at least $5 million to fund the restoration and operation of the uranium complex. In the same month, World Wide took over management of the TGK complex and began to make loans under the Loan Agreement. *Id.* ¶¶ 58, 59, 61.

The third agreement was the Strategic Alliance Agreement, which World Wide entered into with Kazatomprom on February 28, 1997. Kazatomprom is a corporation, wholly owned by the Republic of Kazakhstan, that is charged with managing nuclear energy complexes and promoting the development of uranium production in Kazakhstan. *Id.* ¶ 60. In the Strategic Alliance Agreement, the parties agreed to form a joint venture to explore, develop, and mine several other uranium sources, including deposits in Kazakhstan's Southern Mines, and to market uranium from those sources. *Id.* ¶ 69. Kazatomprom also agreed to "assist" World Wide in obtaining a uranium export license from Kazakhstan. Strategic Alliance Agreement ¶ 8.2.

Finally, on March 25, 1997, World Wide, TGK, and the Kazakhstan State Committee entered into a fourth agreement, the Pledge Agreement. This agreement gave World Wide a security interest in the assets and shares of TGK as collateral for its loans. The Pledge Agreement also prohibited the transfer of any of the pledged assets or shares. Am. Compl. ¶¶ 70, 85; Pledge Agreement ¶ 5.1.3.

On March 27, 1997, following execution of the Pledge Agreement, World Wide entered into a contract with Consumers Energy Company, a Michigan utility, to deliver approximately $4.1 million worth of Kazakhstan uranium. In order to fulfill this contract, World Wide needed to receive an export license by May 30, 1997. By the end of April, however, World Wide had not received the necessary license, and, on April 30, it suspended mining operations at the TGK complex. Am. Compl. ¶¶ 71-73.

*Appendix A*

In May 1997, in response to its requests for an export license, a Kazakhstan official told World Wide that Kazakhstan had previously given another company, Nukem, exclusive rights to the entire quota of uranium that Kazakhstan was permitted to export to the United States. That quota was determined by a Suspension Agreement between the two countries. *Id.* ¶¶ 77, 78.[3] Although World Wide continued to seek an export license from Kazakhstan, and negotiated several extensions of its contract with Consumers Energy pending the grant of such a license, its final extension ran out on July 4, 1997. On July 10, the contract between World Wide and Consumers Energy was terminated. World Wide alleges that, during the period in which it was trying to obtain a license, Nukem approached Consumers Energy with an offer to sell it uranium in the event that World Wide failed to obtain the license, and that subsequently Nukem did sell Kazakhstan uranium to Consumers Energy. *Id.* ¶¶ 82-84.

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3. Kazakhstan had entered into the Suspension Agreement in return for the United States' agreement to suspend an antidumping investigation initiated by the Department of Commerce under the Tariff Act, 19 U.S.C. § 1673a. *See* Agreement Suspending the Antidumping Investigation on Uranium from Kazakhstan ("Suspension Agreement"), *reproduced at* 57 Fed. Reg. 49,220, 49,222 (Oct. 30, 1992); Am. Compl. ¶ 33. The Suspension Agreement specifically provided that uranium exported to the United States required "export licenses and certificates . . . issued in a manner determined by the Government of Kazakhstan, in accordance with laws of Kazakhstan." Suspension Agreement ¶ V.A., 57 Fed. Reg. at 49,224.

Thereafter, what was left of World Wide's relationship with Kazakhstan quickly deteriorated. On August 1, Kazakhstan terminated the Management Agreement, declaring that World Wide had failed to fulfill its obligations. It then allegedly seized $1 million worth of World Wide's uranium and other property located at the TGK complex, and forced World Wide's employees to leave the country. *Id.* ¶¶ 86-87. Finally, on October 2, 1997, Kazakhstan issued a decree transferring all of the assets and shares of TGK to Kazatomprom. *Id.* ¶ 17; Republic of Kazakhstan, Ministry of Finance, Resolution No. 317 (Oct. 2, 1997) (J.A. at 431).

In May 1998, World Wide sued Kazakhstan, the Kazakhstan State Committee, Kazatomprom, and Nukem in the United States District Court for the District of Columbia. In its eleven-count amended complaint, World Wide alleged that Kazakhstan and the Kazakhstan State Committee (collectively Kazakhstan) breached their agreements with World Wide, fraudulently induced World Wide to enter into several of the agreements, wrongfully converted its property, tortiously interfered with its contracts, unlawfully conspired against it, and committed acts that violated RICO. In addition to damages for these violations, World Wide sought a declaratory judgment establishing its "right to market Kazakhstan uranium under the Suspension Agreement or otherwise." Am. Compl. ¶ 161. World Wide joined Kazatomprom in most of these counts, and joined Nukem as a defendant in the counts for tortious interference, conspiracy, and violation of RICO, and in its request for a declaratory judgment. Although World Wide alleges various wrongful

conduct, the amended complaint identifies Kazakhstan's denial of its application for an export license as "the very heart of this matter." *Id.* ¶ 157.[4]

The defendants moved to dismiss World Wide's amended complaint, arguing that the court lacked personal and subject matter jurisdiction, and that the act of state doctrine barred adjudication of World Wide's claims. The district court granted the motions to dismiss, and denied World Wide's request to file a second amended complaint as futile. *World Wide Minerals Ltd. v. Republic of Kazakhstan*, 116 F. Supp. 2d 98 (D.D.C. 2000). The court began by holding that, because Kazakhstan had expressly waived its sovereign immunity in the Pledge Agreement, the FSIA, 28 U.S.C. §§ 1330(a) & (b), 1605(a)(1), gave the court personal jurisdiction over Kazakhstan and Kazatomprom and subject matter jurisdiction over all of World Wide's claims against

4. The eleven counts, and the defendants to which they apply, are as follows: Count I, against Kazakhstan and Kazatomprom, for breach of the Management Agreement; Count II, against Kazakhstan, for breach of the Loan Agreement; Count III, against Kazakhstan, for breach of the Pledge Agreement; Count IV, against Kazatomprom, for breach of the Strategic Alliance Agreement; Count V, against Kazakhstan and Kazatomprom, for fraud in the inducement to enter into the Management and Loan agreements; Count VI, against Kazakhstan and Kazatomprom, for fraud in the inducement to enter into the Strategic Alliance Agreement; Count VII, against Kazakhstan and Kazatomprom, for conversion; Count VIII, against all defendants, for tortious interference with World Wide's contracts with its sales agent and Consumers Energy; Count IX, against all defendants, for civil conspiracy; Count X, against all defendants, for violation of RICO; and Count XI, against all defendants, for a declaratory judgment.

them. 116 F. Supp. 2d at 103.[5] The court concluded, however, that "granting World Wide relief would require a judgment on the acts of a sovereign state," including Kazakhstan's failure to grant World Wide an export license and its decision to expropriate World Wide's property. Accordingly, the court held the claims against the Kazakhstan defendants barred by the act of state doctrine. *Id.* at 104.

The district court also dismissed World Wide's claims against Nukem, holding that it lacked personal jurisdiction over the corporation. The court rejected all of the jurisdictional theories asserted by World Wide, including the "transacting business" clause of the District of Columbia's long-arm statute, D.C. Code § 13-423(a)(1), and "conspiracy jurisdiction." The court rejected the latter two theories on the ground that the only act sufficient to satisfy their prerequisites took place after World Wide's injuries had already been incurred. 116 F. Supp. 2d at 108. World Wide now appeals.

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5. The FSIA grants United States courts both subject matter and personal jurisdiction (where service of process has been made) over any claim against a foreign state as to which the state is not entitled to immunity. 28 U.S.C. § 1330(a), (b). The district court held that, where one of the FSIA's exceptions to sovereign immunity (e.g., waiver) applies, a foreign government and its instrumentalities are subject to suit without the need to apply the "minimum contacts" test traditionally used in determining whether the assertion of personal jurisdiction satisfies due process. 116 F. Supp. 2d. at 102-03. Subsequently, this circuit reached the same conclusion with respect to "an actual foreign government," but expressed no view as to whether that conclusion also applied to "other entities that fall within the FSIA's definition of 'foreign state'— including corporations in which a foreign state owns a majority interest." *See Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 99-100 (D.C. Cir. 2002).

*Appendix A*

II

We review the district court's dismissal of World Wide's complaint de novo, and must accept the complaint's allegations as true for purposes of this appeal. *See El-Hadad v. United Arab Emirates*, 216 F.3d 29, 31, 32 n.5 (D.C. Cir. 2000). In doing so, we consider only the allegations of the (first) amended complaint. Although World Wide indicated in its notice of appeal that it planned to challenge the district court's refusal to permit it to file a second amended complaint, *see* Fed.R.Civ.P. 15(a), it failed to do so until its reply brief. As we have said many times before, a party waives its right to challenge a ruling of the district court if it fails to make that challenge in its opening brief. *See, e.g., Students Against Genocide v. Department of State*, 257 F.3d 828, 834-35 (D.C. Cir. 2001); *Board of Regents v. EPA*, 86 F.3d 1214, 1221 (D.C. Cir. 1996); *see also Terry v. Reno*, 101 F.3d 1412, 1415 (D.C. Cir. 1996) (holding that where the appellants listed challenges in the "Statement of Issues," but failed to brief them, the challenges were waived).

World Wide contends that none of the defendants' motions to dismiss should have been granted. In response, Kazakhstan, Kazatomprom, and Nukem assert that the district court was correct in ruling that a variety of threshold obstacles, including sovereign immunity, the act of state doctrine, and lack of personal jurisdiction, barred World Wide's claims. In the following three Parts, we address the issues relating to each defendant separately.

*Appendix A*

III

World Wide's amended complaint levels ten of its eleven charges against Kazakhstan (including the Kazakhstan State Committee). They are: Count I (breach of the Management Agreement), Count II (breach of the Loan Agreement), Count III (breach of the Pledge Agreement), Count V (fraud in the inducement to enter into the Management and Loan agreements),[6] Count VI (fraud in the inducement to enter into the Strategic Alliance Agreement), Count VII (conversion), Count VIII (tortious interference), Count IX (civil conspiracy), Count X (violation of RICO), and Count XI (declaratory judgment). In Part III.A, we conclude that the district court lacked subject matter jurisdiction over seven of these counts, because Kazakhstan has sovereign immunity against their adjudication in United States courts. In Part III.B, we conclude that the remaining three counts were properly dismissed pursuant to the act of state doctrine.

A

We turn first to whether the district court was correct in concluding that it had subject matter jurisdiction over all of World Wide's claims against Kazakhstan. *See In re Papandreou*, 139 F.3d 247, 254-56 (D.C. Cir. 1998) (holding that jurisdiction must be resolved before applying the act of state

6. Although the title of this count also alleges fraud in the inducement to enter into the "Preliminary Agreement," neither the count nor World Wide's briefs allege any damages or make any argument relating to that agreement, and we therefore give it no independent consideration.

doctrine, because that doctrine is "a substantive rule of law").[7] The FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683, 688, 102 L. Ed. 2d 818 (1989). Under the FSIA, a district court has jurisdiction over a civil action against a foreign state for any claim "with respect to which the foreign state is not entitled to immunity." 28 U.S.C. § 1330(a). The Act provides that a foreign state is generally immune from the court's jurisdiction unless one of the exceptions listed in the statute applies. *Id.* §§ 1604, 1605; *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488-89, 103 S. Ct. 1962, 1968-69, 76 L. Ed. 2d 81 (1983).[8]

In the district court, World Wide argued that the court had subject matter jurisdiction under two FSIA exceptions: the waiver exception, 28 U.S.C. § 1605(a)(1), and the commercial activity exception, *id.* § 1605(a)(2). In its briefs on appeal, however, World Wide did not argue that the commercial activity exception was applicable, relying instead

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7. In its reply brief, World Wide argues that we cannot review the district court's finding of subject matter jurisdiction because the appellees "failed to cross-appeal on this issue." World Wide Reply Br. at 11. To the contrary, we have an independent responsibility to consider that question. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95, 118 S. Ct. 1003, 1012-13, 140 L. Ed. 2d 210 (1998).

8. World Wide does not dispute that the Kazakhstan State Committee is an "agency or instrumentality of a foreign state" within the meaning of the FSIA. 28 U.S.C. § 1603(a), (b); *see* World Wide Br. at xiii. As such, like Kazakhstan, the State Committee is entitled to immunity unless one of the statute's enumerated exceptions applies. *Id.* § 1604.

on the waiver exception.[9] And at oral argument, World Wide eschewed any reliance on the FSIA's commercial activity exception. Accordingly, we limit our inquiry to whether the district court had jurisdiction by virtue of Kazakhstan's waiver of immunity.[10] Under the FSIA's waiver exception, a state is not immune from suit in any case "in which the foreign state has waived its immunity either explicitly or by implication." *Id.* § 1605(a)(1). World Wide does not rely on a theory of implied waiver, but rather on the explicit waivers of sovereign immunity contained in the Pledge and Management agreements.[11]

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9. This was so despite the fact that Kazatomprom devoted a substantial portion of its brief to arguing against the applicability of the commercial activity exception. *See* Kazatomprom Br. at 14-24.

10. The *defense* of sovereign immunity may be raised at any time because, if valid, it means that the court lacks power to hear the case. *See Steel Co.*, 523 U.S. at 94-95, 118 S. Ct. at 1012-13. A *challenge* to sovereign immunity, by contrast, is an argument that can be waived. *See Watters v. Washington Metro. Area Transit Auth.*, No. 01-7092, slip. op. at 7 n.13 (D.C. Cir. July 17, 2002) (holding that a claim that sovereign immunity has been waived is itself waived if not argued on appeal).

11. As we have previously noted, the "FSIA does not define an implied waiver." *Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118, 122 (D.C. Cir. 1999). This circuit, however, has "followed the 'virtually unanimous' precedents construing the implied waiver provision narrowly." *Id.* (quoting *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991)). Courts have found implied waiver where a foreign state has filed a responsive pleading without raising the defense of sovereign immunity. *Id.* at 123. They have also found implied waiver where the state has agreed to arbitrate or to adopt a particular choice of law, under circumstances not present in this case. *Id.*; *see id.* at 122 (" '[M]ost courts have refused to find

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*Appendix A*

In general, explicit waivers of sovereign immunity are narrowly construed "in favor of the sovereign" and are not enlarged "beyond what the language requires." *Library of Cong. v. Shaw*, 478 U.S. 310, 318 (1986) (internal quotation marks omitted); *see Watters v. Washington Metro. Area Transit Auth.*, No. 01-7092, slip. op. at 5, 2002 WL 1484943 *1 (D.C. Cir. July 12, 2002) (requiring "clear and unequivocal" waiver); *Forman v. Small*, 271 F.3d 285, 296 (D.C. Cir. 2001). A foreign sovereign will not be found to have waived its immunity unless it has clearly and unambiguously done so. *See Aquamar S.A. v. Del Monte Fresh Produce N.A., Inc.*, 179 F.3d 1279, 1292 (11th Cir. 1999) ("An express waiver under section 1605(a)(1) must give a clear, complete, unambiguous, and unmistakable manifestation of the sovereign's intent to waive its immunity." (internal quotation marks omitted)); *see also Maritime Int'l Nominees Establishment v. Republic of Guinea*, 693 F.2d 1094, 1100 n.10 (D.C. Cir. 1982) (holding that under the FSIA, Congress contemplated waivers of a "specific and explicit nature").[12]

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(Cont'd)
an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than the United States.' " (quoting *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985))); *id.* at 126 (holding "that Qatar did not, by agreeing to arbitrate in France, waive its sovereign immunity under § 1605(a)(1)"). As we have also noted, " 'courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity.' " *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (quoting *Frolova*, 761 F.2d at 377).

12. *Cf. C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418, 421 n.3, 423, 121 S. Ct. 1589, 1594, 149 (Cont'd)

*Appendix A*

There is no question that Kazakhstan clearly indicated its intent to waive its immunity for the claims contained in Count I (breach of the Management Agreement) and Count III (breach of the Pledge Agreement), as both the Management and Pledge agreements contain express waivers of sovereign immunity—the latter referring specifically to the FSIA.[13] But the district court further held that the waiver in the Pledge Agreement indicated Kazakhstan's intention to waive immunity for World Wide's entire lawsuit. As to this we cannot agree. Neither the waiver in the Pledge Agreement, nor that in the Management Agreement, describes the kind of claims for which Kazakhstan waived immunity. And there is nothing "clear and unambiguous" about either waiver other than that each extends to claims for breach of the agreement

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(Cont'd)

L. Ed. 2d 623 (2001) (holding that "to relinquish its immunity, a tribe's waiver must be clear" and "not ambiguous," and finding instructive "the law governing waivers of immunity by foreign sovereigns" (internal quotation marks omitted)).

13. The Management Agreement states: "In respect of any arbitration or legal action or proceedings arising out of or in connection with this Agreement, . . . [the Kazakhstan State Committee] hereby irrevocably agrees not to claim and hereby irrevocably waives . . . immunity for itself and the assets of the Republic of Kazakstan to the full extent permitted by the laws of such jurisdiction." Management Agreement ¶ 6.4. The Pledge Agreement states: "[T]he Grantor [defined as Kazakhstan and TGK] hereby irrevocably agrees not to claim and hereby irrevocably waives . . . immunity for themselves and their Assets to the full extent permitted by the laws of such jurisdiction with the intent inter alia that the foregoing waiver of immunity shall have irrevocable effect for the purposes of the [FSIA] in any legal action or proceedings to which such Act applies." Pledge Agreement ¶ 19.5.

in which it is contained.[14] We see nothing in these waivers to indicate that they extend to breaches of the two other agreements at issue in this case (the Loan and Strategic Alliance agreements), neither of which contains a waiver of its own.

Indeed, the fact that only two of the four agreements contain waivers is particularly significant in creating ambiguity. Although it could be argued that the parties saw no need for repetition once a waiver was made in the Management Agreement, which was the first of the four, that does not explain why they thought it necessary to include a waiver in the Pledge Agreement, which was the last. Moreover, regardless of what *could* be argued, the fact is that the presence of waivers in only two of four agreements creates real ambiguity as to Kazakhstan's intent. *Cf. Marra v. Papandreou*, 216 F.3d 1119, 1123 (D.C. Cir. 2000) ("If the Greek government were sued by Marra for breach of two different contracts, it certainly would have the prerogative to waive a sovereign immunity defense with respect to one of the contracts and invoke that defense for the other.").

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14. Supporting the conclusion that the waivers do not apply to all of World Wide's claims is the fact that each of these agreements contains a provision limiting the agreement's scope. The Management Agreement states that "[t]he subject of this Agreement shall be the transfer to World Wide of the right to manage, control, use and own the State-owned or controlled block of shares in [TGK]." Management Agreement ¶ 1. And the Pledge Agreement includes an integration clause stating that "[t]his Pledge Agreement constitutes and contains the entire agreement of the parties." Pledge Agreement ¶ 21.1. Although the Pledge Agreement grants World Wide a security interest in TGK shares and assets, *id.* ¶ 2.1, it does not itself include an agreement to repay World Wide's loans to TGK.

So, too, do provisions in both the Loan and Strategic Alliance agreements that suggest Kazakhstan did *not* contemplate that disputes over those agreements would be resolved in United States courts, but rather by arbitration in Kazakhstan and Sweden.[15]

Nor do we see evidence that, by waiving immunity for claims for breach of the Management and Pledge agreements, Kazakhstan unambiguously intended to expose itself to the miscellany of tort and tort-like claims with which World Wide has charged it. Unlike the claims for breach of those two contracts, which arise out of consensual agreements containing waivers of immunity, the tort claims arise out of exogenous law. Indeed, in this case that law is truly "exogenous." World Wide seeks application of the law of the United States (including RICO), *see* World Wide Opp'n to Mot. to Dismiss, notwithstanding that no American national was a party to any of the four agreements, and notwithstanding that each agreement declares that it "shall be governed by and construed in accordance with the laws of Kazakhstan." Management Agreement ¶ 6.1; Pledge Agreement ¶ 18.1;

15. *See* Strategic Alliance Agreement ¶ 9.3 ("If any dispute or difference arises out of or in connection with any matter in relation to this Strategic Alliance Agreement . . . , the same shall be arbitrated between the Parties and the arbitration shall be conducted . . . in Almaty, Kazakhstan."); Loan Agreement ¶ 4.2 ("If any default or dispute or difference . . . arises out of or in connection with any matter or thing in relation to the provisions of this Agreement, . . . any party may submit the Dispute to be settled by arbitration . . . conducted in Stockholm, Sweden. . . ."). Although an agreement to arbitrate may in some circumstances constitute an implied waiver of sovereign immunity, this is not such a circumstance and World Wide does not contend that it is. *See supra* note 11 and accompanying text.

Loan Agreement ¶ 4.1; Strategic Alliance Agreement ¶ 9.2.[16] Plaintiff makes no argument and cites no cases that support extending the waivers to these kinds of claims, and analogous cases are to the contrary.[17]

In sum, we find that Kazakhstan clearly and unambiguously waived its sovereign immunity only for claims of breach of the Management and Pledge agreements, and we therefore hold that the district court only had jurisdiction to hear counts that make such claims. Those counts are Count I (breach of the Management Agreement) and Count III (breach of the Pledge Agreement), as well as Count XI (declaratory

16. Kazakhstan's contention that as a civil law jurisdiction it does not recognize common law torts, may be still further evidence that Kazakhstan did not intend to waive immunity for tort claims like those asserted here. *See* Kazakhstan Mot. to Dismiss for Failure to State a Claim, at 9-10. In light of the significant ambiguities concerning waiver noted in the text, we need not rely on this point to decide this case, and hence need not consider Kazakhstan's representation regarding its legal system. We note, however, that World Wide did not dispute that representation. *See* World Wide Opp'n to Mot. to Dismiss.

17. *Cf. Hercules, Inc. v. United States*, 516 U.S. 417, 423, 116 S. Ct. 981, 985-86, 134 L. Ed. 2d 47 (1995) (holding that the Tucker Act's waiver of sovereign immunity for contract claims does not extend to claims for contracts implied in law); *Watters*, slip op. at 5-7 (concluding that the WMATA Compact's waiver of immunity for contracts and torts does not extend to attorney's liens); *Doe v. Civiletti*, 635 F.2d 88, 94-95 (2d Cir. 1980) (holding that the Tucker Act's waiver does not extend to statutory claims); *Rodenbur v. Kaufmann*, 320 F.2d 679, 683-84 (D.C. Cir. 1963) (holding that a lease's waiver of trial by jury for "any matters whatsoever arising out of or in any way connected with this lease" did not extend to a tort claim).

judgment) to the extent that it seeks a declaration that Kazakhstan breached the Management Agreement.[18] As for all of the other claims against Kazakhstan, there has been no waiver, and we therefore affirm their dismissal for lack of subject matter jurisdiction.

B

Having concluded that the district court had subject matter jurisdiction over the claims in Counts I, III, and XI, we now turn to Kazakhstan's contention that another threshold objection—the act of state doctrine—bars adjudication of those counts. Although ordinarily we would first examine the validity of the district court's decision that it had personal jurisdiction over Kazakhstan, *see Papandreou*, 139 F.3d at 254-56, Kazakhstan does not dispute that decision on appeal. Unlike subject matter jurisdiction, a party waives the right to dispute personal jurisdiction by failing to contest it on appeal. *See Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32-33 (D.C. Cir. 1990).

The act of state doctrine "precludes the courts of this country from inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own

18. In Count XI, World Wide asks the court to declare that it "had the right to market Kazakhstan uranium under the Suspension Agreement." Am. Compl. ¶ 161. Since World Wide obtained this right, if at all, under the Management Agreement, we construe Count XI as a request for a declaration that Kazakhstan breached that agreement by not granting World Wide an export license. To the extent that this relatively opaque count asserts other claims, Kazakhstan has not waived its immunity and the district court was without jurisdiction to entertain them.

territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401, 84 S. Ct. 923, 926, 11 L. Ed. 2d 804 (1964). It is applicable when "the relief sought or the defense interposed would [require] a court in the United States to declare invalid the official act of a foreign sovereign performed within" its boundaries. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 405, 110 S. Ct. 701, 704, 107 L. Ed. 2d 816 (1990). When it does apply, the doctrine serves as " 'a rule of decision for the courts of this country,' " *id.* at 405, 110 S.Ct. at 704 (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310, 38 S. Ct. 312, 314, 62 L. Ed. 733 (1918)), which requires that, "in the process of deciding [a case], the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid," *id.* at 409, 110 S.Ct. at 707. Although the Supreme Court's description of the jurisprudential rationale for the doctrine has evolved over the years, the Court has most recently described it "as a consequence of domestic separation of powers, reflecting 'the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder' the conduct of foreign affairs." *Id.* at 404, 110 S. Ct. at 704 (quoting *Sabbatino*, 376 U.S. at 423, 84 S. Ct. at 938). The policies underlying the doctrine include "international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations." *Id.* at 408, 110 S. Ct. at 706; *see id.* at 409, 110 S. Ct. at 706-07.

The gravamen of Count I is a claim that Kazakhstan breached the Management Agreement by "failing to issue an export license" to World Wide. Am. Compl. ¶ 93. Count XI seeks a declaratory judgment for breach of that agreement, and declares that "the denial of Plaintiff[']s export license" is "the very heart of this matter." *Id.* at ¶ 157. We have no

doubt that issuance of a license permitting the removal of uranium from Kazakhstan is a sovereign act. As we have previously held in the context of the FSIA, the "right to regulate imports and exports is a sovereign prerogative." *Millen Indus., Inc. v. Coordination Council for North Am. Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988) (internal quotation marks and alteration omitted); *see Int'l Ass'n of Machinists v. OPEC*, 649 F.2d 1354, 1361 (9th Cir. 1981) (affirming "the principle of supreme state sovereignty over natural resources" in applying the act of state doctrine); *cf. Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989) (holding that "a contract whereby a foreign state grants a private party a license to exploit the state's natural resources is *not* a commercial activity [under the FSIA], since natural resources, to the extent they are 'affected with the public interest,' are goods in which only the sovereign may deal"); *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326, 1328 (9th Cir. 1984) (holding that "licensing the exploitation of natural resources is a sovereign activity" under the FSIA).

Because the relief sought here would require us to question the "legality" of Kazakhstan's denial of the export license by ruling that denial a breach of contract,[19] the act of state doctrine applies. *Kirkpatrick*, 493 U.S. at 405, 110 S. Ct. at 704. Moreover, this is plainly a case in which the policies underlying the doctrine "justify its application," *id.* at at 409, 110 S. Ct. at 706, since questioning the export control policies

19. If anything, the specific relief sought in Count XI challenges the validity of Kazakhstan's actions even more directly, as it asks the court to declare that, despite the absence of a license, World Wide had "the right to market Kazakhstan uranium." Am. Compl. ¶ 161.

of a foreign state would both disrupt international comity and interfere with the conduct of foreign relations by the Executive Branch. *Cf. Clayco Petroleum Corp. v. Occidental Petroleum Corp.*, 712 F.2d 404, 408 (9th Cir. 1983) ("[I]t is clear that judicial scrutiny of sovereign decisions allocating the benefits of oil development would embarrass the political branches of our government in the conduct of foreign policy."). Indeed, as the amended complaint reveals, both the export of Kazakhstan uranium to the United States and the use of licenses to control the quantity of such exports are the subjects of diplomatic efforts by the Executive. *See supra* note 3 and accompanying text. Accordingly, we conclude that the claims asserted in Counts I and XI must fail as a consequence of the act of state doctrine, and we therefore affirm the dismissal of those counts.

Our analysis of Count III is the same. In that count, World Wide alleges that Kazakhstan breached the Pledge Agreement by "transferring the shares of TGK to Kazatomprom and by converting all pledged property, assets and interests for [its] own use." Am. Compl. ¶ 103. The amended complaint makes clear that this transfer and alleged conversion were accomplished pursuant to an official decree of the Republic of Kazakhstan. *Id.* ¶ 17; *see* Republic of Kazakhstan, Ministry of Finance, Resolution No. 317 (Oct. 2, 1997) (J.A. at 431). That kind of expropriation of property is the classic act of state addressed in the case law. And as the Supreme Court declared in *Sabbatino*, "the Judicial Branch will not examine the validity of a taking of property within its own territory by a foreign sovereign government." 376 U.S. at 428, 84 S. Ct. at 940; *see id.* at 430, 439, 84 S. Ct. at 941, 946; *Riggs Nat'l Corp. v. Comm'r of Internal Revenue Serv.*, 163 F.3d 1363, 1367 (D.C. Cir. 1999)

(citing *Sabbatino*, 376 U.S. at 403-04, 84 S. Ct. at 927); *Dayton v. Czechoslovak Socialist Republic*, 834 F.2d 203, 206 (D.C. Cir. 1987); *Empresa Cubana Exportadora v. Lamborn & Co.*, 652 F.2d 231, 237-38 (2d Cir. 1981); *Hunt v. Mobil Oil*, 550 F.2d 68, 73 (2d Cir. 1977). Because Count III would require the court to undertake just such an examination, we affirm its dismissal.

At oral argument, World Wide acknowledged that both the denial of export licenses and the expropriation of property are sovereign acts under the act of state doctrine. It nonetheless contended that this case comes within an exception to that doctrine for "commercial activity." The existence of such an exception is an unsettled question that this court has never addressed.[20] Nor need we do so today.

In claiming the benefit of the exception here, World Wide contends that its claims are not based on Kazakhstan's expropriation of its assets or on its denial of an export license, but rather on the following "purely" commercial conduct: 1) Kazakhstan's failure to repay loans and interest; 2) its refusal to enter into a joint venture with World Wide; and 3) its failure to pay management fees. World Wide Br. at 24, 26. However, the first of these claims is made only in Count II (breach of the Loan Agreement)—a count that we have already held must be dismissed for lack of subject matter jurisdiction. The second is made only in Count IV (breach of

20. *See Kirkpatrick*, 493 U.S. at 404-05, 110 S. Ct. at 704 (noting that "some Justices have suggested" a possible exception for commercial activity, but finding it unnecessary to consider the question to resolve the case); *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 695, 96 S. Ct. 1854, 1861-62, 48 L. Ed. 2d 301 (1976) (plurality opinion of White, J., adopting commercial activity exception).

the Strategic Alliance Agreement), which does not name Kazakhstan as a defendant (and for which there was also no waiver of sovereign immunity). And the third is not made anywhere in the complaint—not even in what would seem the most likely place, Count I (breach of the Management Agreement). We, therefore, have no cause to address World Wide's contention that its claims fall within a commercial activity exception to the act of state doctrine.

In sum, we conclude that, although the district court had subject matter jurisdiction over three claims against Kazakhstan (Counts I, III, and XI), all three must nonetheless be dismissed under the act of state doctrine.

IV

In addition to naming Kazakhstan as a defendant, most of the counts of the amended complaint also name Kazatomprom, a corporation wholly owned by Kazakhstan.[21] World Wide does not dispute that Kazatomprom is an instrumentality of Kazakhstan. World Wide Br. at xiii; *see* 28 U.S.C. § 1603(b) (providing that an "instrumentality of a foreign state" includes any corporation, "a majority of whose shares or other ownership interest is owned by a foreign state"). As a consequence, Kazatomprom is entitled to the immunity of the sovereign. *See* 28 U.S.C. §§ 1603(a), 1604; *NYSA-ILA Pension Trust Fund v. Garuda Indonesia*, 7 F.3d 35, 38 (2d Cir. 1993) ("A defendant corporation that

21. *See supra* note 4 for a list of the counts. Kazatomprom is not named in Count II (breach of the Loan Agreement) or Count III (breach of the Pledge Agreement). It is the sole defendant in Count IV (breach of the Strategic Alliance Agreement).

is owned entirely by a foreign state also is considered to be a distinct foreign state and immune from the jurisdiction of the federal courts."). Thus, for the same reasons discussed in Part III.A, the district court lacked jurisdiction to consider against Kazatomprom any of the counts of the amended complaint other than those alleging breaches of the only two agreements containing waivers of immunity: the Management and Pledge agreements. And because Kazatomprom is not a defendant in Count III (breach of the Pledge Agreement), that leaves only Count I (breach of the Management Agreement) and Count XI (declaratory judgment, limited to breach of the Management Agreement).[22]

Our decision in Part III.B also effectively disposes of those two remaining counts. In that part, we held that because the gravamen of both Counts I and XI is an attack on the legality of Kazakhstan's refusal to grant World Wide an export license, those counts are barred—as against Kazakhstan—by the act of state doctrine. And since World Wide offers no reason to distinguish between Kazakhstan and Kazatomprom for purposes of the application of that doctrine,[23] our holding in Part III.B dispositively resolves the identical claims against Kazatomprom. This means that there is no substantial federal question as to World Wide's

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22. Although we did not directly address Count IV (breach of the Strategic Alliance Agreement) in Part III.A since Kazakhstan was not named as a defendant in that count, the analysis of that Part applies because the Strategic Alliance Agreement does not contain a waiver of sovereign immunity. The district court therefore lacked subject matter jurisdiction over that count.

23. Nor does the amended complaint distinguish between the two in these counts.

claims against Kazatomprom. And because in the absence of a substantial federal question the district court lacks jurisdiction, we may affirm the dismissal of these counts as well for lack of jurisdiction. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 98-99, 118 S. Ct. 1003, 1014, 140 L. Ed. 2d 210 (1998) (noting that the Court has regarded a judgment against a plaintiff, entered because the same issue had been "dispositively resolved" in a companion case, as "equivalent to a jurisdictional dismissal for failure to present a substantial federal question" (citing *Norton v. Mathews*, 427 U.S. 524, 530-31, 96 S. Ct. 2771, 2774-75, 49 L. Ed. 2d 672 (1976))).

V

Finally, we turn to the district court's decision to dismiss World Wide's claims against Nukem. The amended complaint names Nukem as a defendant in four counts: Count VIII (tortious interference), Count IX (civil conspiracy), Count X (violation of RICO), and Count XI (declaratory judgment). Because Nukem is neither a state nor the instrumentality of a state, it cannot assert sovereign immunity as a defense. Nor can we say, as we did regarding Kazatomprom, that our resolution of the act of state issues with respect to Kazakhstan removes any substantial federal question regarding the claims against Nukem, since we never reached the act of state question with respect to Counts VIII-XI, dismissing them instead for lack of subject matter jurisdiction.[24] We must therefore turn to

24. In Part III.B, we did conclude that Count XI is barred by the act of state doctrine to the extent that it reasserts Count I's claim of breach of the Management Agreement. But Nukem is not a defendant in Count I, and our act of state analysis did not address the allegation of Count XI that concerns Nukem—that it does not have an exclusive right to market Kazakhstan uranium in the United States. Am. Compl. ¶¶ 157-60.

the jurisdictional ground upon which the district court dismissed the counts against Nukem: personal jurisdiction.

Nukem is a New York corporation with its principal place of business in Connecticut. In the district court, World Wide asserted four alternative grounds for personal jurisdiction, all of which the court rejected: the transacting business clause of the District of Columbia's long-arm statute, D.C. Code § 13-423(a)(1); conspiracy jurisdiction; the nationwide service of process provision of RICO, 18 U.S.C. § 1965(d); and the nationwide service of process provision of the Clayton Act, 15 U.S.C. § 22. On appeal, World Wide argued only the first two grounds in its opening brief and has therefore waived reliance on the latter two. *See Students Against Genocide*, 257 F.3d at 834-35.

Under the District's long-arm statute, local courts may exercise personal jurisdiction over any person "as to a claim for relief arising from the person's . . . transacting any business in the District of Columbia." D.C. Code § 13-423(a)(1). The statute makes clear that, where jurisdiction is predicated solely upon the long-arm statute, "only a claim for relief arising from acts enumerated in this section may be asserted." *Id.* § 13-423(b). Thus, personal jurisdiction under this theory "is limited to claims arising from the particular transaction of business" in the District. *AMAF Int'l Corp. v. Ralston Purina Co.*, 428 A.2d 849, 850 (D.C.1981); *see Naartex Consulting Corp. v. Watt*, 722 F.2d 779, 785-86 (D.C. Cir. 1983). Similarly, to establish jurisdiction under a theory of civil conspiracy, the plaintiff must plead with particularity "overt acts within the forum taken in furtherance of the

conspiracy." *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997) (internal quotations marks omitted).

The district court held, and World Wide does not dispute, that the only act that might satisfy these jurisdictional requirements was a meeting between Nukem officials and Kazakhstan's Ambassador, which World Wide alleges took place at Kazakhstan's embassy in Washington, D.C. 116 F.Supp.2d at 106-07; World Wide Br. at 45. World Wide alleges that these individuals met at the embassy "for the purpose of obtaining and/or confirming [Kazakhstan's] agreement to unlawfully breach its contract with Plaintiffs by denying their pending petition for a license to export" Kazakhstan uranium to the United States. Am. Compl. ¶ 6. As a result of some confusion in the parties' pleadings, the district court understood World Wide to allege that this meeting took place in December 1997. Since the court also understood from World Wide's allegations that all of its injuries occurred prior to that date, the court concluded that World Wide's claims could not have arisen from that meeting and that the meeting could not have furthered the conspiracy. The court therefore concluded that it had neither long-arm nor conspiracy jurisdiction over Nukem. 116 F. Supp. 2d at 106, 108.

On appeal, the parties agree that there was a misunderstanding in the district court regarding the date upon which the embassy meeting allegedly occurred. Both World Wide and Nukem now agree that the relevant allegation—which we must take as true for purposes of this appeal—is that Nukem and Kazakhstan conspired together at a meeting that

took place in the District of Columbia in late May 1997. *See* Am. Compl. ¶ 6; Nukem Br. at 11. The basis for the district court's dismissal therefore no longer suffices. Although Nukem contends that May 1997 was also too late to have contributed to the injuries claimed by World Wide, World Wide disputes that contention. Accordingly, we must remand the case to the district court to resolve the dispute over its jurisdiction.

VI

For the foregoing reasons, we affirm, although in part for different reasons, the district court's dismissal of World Wide's complaint against Kazakhstan and Kazatomprom. The dismissal with respect to Nukem is remanded for further proceedings consistent with this opinion.

*Affirmed in part and remanded in part.*

## APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA DATED SEPTEMBER 27, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

**No. 98 CV 1199-RCL.**

WORLD WIDE MINERALS LTD., World Wide Resource Finance Inc., Kazuran Corporation, and Nuclear Fuel Resources Corporation,

Plaintiffs,

v.

The REPUBLIC OF KAZAKHSTAHN, The State Committee of the Republic of Kazakhstan on the Management of State Property, The National Atomic Company Kazatomprom, and Nukem, Inc.,

Defendants.

Sept. 27, 2000.

MEMORANDUM OPINION AND ORDER

LAMBERTH, *District Judge.*

Plaintiffs World Wide Minerals Ltd., World Wide Resources Finance Inc., Kazuran Corporation, and Nuclear Fuel Resources Corporation (hereinafter "World Wide") brought suit over a

contract dispute with the Republic of Kazakhstan concerning the mining and export of uranium. After the filing of the Complaint and First Amended Complaint numerous motions to dismiss were filed by the defendants. Most recently, the plaintiffs have requested Leave to File Second Amended Complaint. The defendants, the Republic of Kazakhstan, the State Committee of the Republic of Kazakhstan on the Management of State Property, the National Atomic Company Kazatomprom, and Nukem Inc., have opposed this motion and moved to dismiss. Upon consideration of these motions, the corresponding replies, the entire record herein, and the relevant law, the Court has determined that:

1. Plaintiff World Wide's Motion for Leave to File Second Amended Complaint is denied for futility.

2. As to defendants the Republic of Kazakhstan, the State Committee on the management of State Property, and Kazuran Corporation (hereinafter 'Kazakhstan') the claims of plaintiff World Wide are barred by the act of state doctrine. Therefore Kazakhstan's motion to dismiss is granted.

3. As to defendant Nukem, the Court lacks personal jurisdiction, and therefore grants defendant Nukem's motion to dismiss.

## BACKGROUND

After gaining independence from the Soviet Union in 1991, Kazakhstan began to seek foreign investment. Among the areas of interest to foreign companies were the northern and southern uranium mines of Kazakhstan. In June of 1996, World Wide Minerals Ltd., a Canadian corporation, submitted

a proposal for the management of the northern mines complex in Kazakhstan. World Wide was simultaneously negotiating with the Kazakhstan Joint Stock Company of Atomic Power, Engineering, and Industry (KATEP) for the right to export and sell uranium from Kazakhstan.

On July 2, 1996, World Wide and KATEP agreed on the points of negotiation. They called for good faith negotiations on the issue of marketing the uranium. No final agreement to market the uranium was ever reached.

On October 7, 1996, Kazakhstan and World Wide entered into the Management Agreement. Under this agreement, World Wide took over the state controlled holding company for the northern mines complex. World Wide committed to paying the debt of the holding company, some 5 million dollars. This agreement indicated that an export license would be required for World Wide to sell the uranium. *See* Proposed Second Am.Compl., Ex. 1, Management Agreement, Schedule 2, ¶ 2.3. World Wide was entitled to terminate the agreement if the license was not received by December 16, 1996. This deadline was extended to March 16, 1997. World Wide never received the export license, but did not suspend activities until April 1997.

On March 25, 1997 World Wide, through its wholly owned subsidiary World Wide Resource Finance Inc., entered into the Pledge Agreement with the State Committee of Kazakhstan. This agreement secured the loans of the Management Agreement. Under Article 19 of the Pledge Agreement, the parties indicated that any disputes would be addressed first by negotiations, and then by arbitration under

UNCITRAL. Paragraph 19.5 provided that the parties would not be restricted in their right to settle disputes in court. That paragraph also provides that Kazakhstan waives immunity "for the purposes of the United States Foreign Sovereign Immunities Act of 1976 in any action or proceedings to which such Act applies."

On January 15, 1997, World Wide contracted with Nuclear Fuel Resources Inc., (NFR) of Colorado to market uranium from the northern mines. NFR and World Wide then entered into an agreement to provide uranium to Consumer's Energy, a Michigan corporation, on March 27, 1997. When the export license was not issued World Wide could not perform its duties under the contract. As a result of the failure to obtain the export license, World Wide suspended operations at the Northern Mines. Kazakhstan informed World Wide that it would not be able to grant an export license because of an earlier agreement with Nukem Inc., a U.S. company, for exclusive marketing of the uranium. This agreement had been kept confidential. In July of 1997, Nukem took over the failed contract with Consumer's Energy. On August 1, 1997, Kazakhstan terminated the northern mines management agreement. Plaintiffs filed suit, alleging breach of contract, conspiracy, violations of the RICO statute and, in the proposed second amended complaint violations of the Sherman Act.

## ANALYSIS

The Plaintiff requested leave to file a second amended complaint. Leave to amend pleading should be given when justice so requires. *See Firestone v. Firestone*, 76 F.3d 1205 (D.C. Cir. 1996). The decision to allow or deny amendment

is firmly within the court's discretion. *Id.* It is proper to deny leave for amendment if the amendment would be futile. *See Graves v. United States*, 961 F. Supp. 314 (D.D.C. 1997). Futility is determined by whether or not the amended complaint would survive a motion to dismiss. *Id.* For reasons explained more fully below, the second amended complaint would be futile.

## *I. Kazakhstan*

### A. FSIA and Minimum Contacts

The Republic of Kazakhstan is a foreign sovereign nation. Foreign sovereigns traditionally have enjoyed immunity from suit in courts of the United States. The Foreign Sovereign Immunities Act ("FSIA") of 1976 lays out the conditions of immunity. FSIA is the sole basis for jurisdiction over foreign nations. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S. Ct. 683, 102 L. Ed. 2d 818 (1989). Instrumentalities of the State also have immunity from suit under FSIA. Both the State Committee of the Republic of Kazakhstan on the Management of State Property and the National Atomic Company Kazatomprom, meet the definition of instrumentalities of state under 28 U.S.C. § 1603(b)(2). The defendants maintain that the exceptions to FSIA do not apply and argue that a minimum contacts test is necessary.

In *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998), this court concluded that the minimum contacts test was not required when deciding jurisdictional issues concerning foreign sovereigns. *See Flatow*, 999 F. Supp.

at 21. In *Flatow*, this court stated that the traditional minimum contacts test was subsumed in the exceptions to FSIA. *Id.* This ruling drew on the Supreme Court's suggestion that a foreign state might not be a "person" for due process considerations. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 619, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992) (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 323-24, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966)). Since *Flatow*, this circuit has raised the issue but not decided it. *See Creighton Limited v. Government of the State of Qatar*, 181 F.3d 118, 124 (D.C. Cir. 1999). Consistent with the decision in *Flatow*, we find that no minimum contacts analysis is required concerning defendants the Republic of Kazakhstan, the State Committee of the Republic of Kazakhstan on the Management of State Property, and the National Atomic Company Kazatomprom. *See Flatow*, 999 F. Supp. at 21. The jurisdictional analysis instead depends on the presence or absence of one of the exceptions to FSIA. *Id.*

In this case, World Wide alleges that Kazakhstan waived its immunity in the "Pledge Agreement." In the alternative, World Wide argues that the acts of Kazakhstan qualify for the commercial activities exception to the FSIA. 28 U.S.C. § 1605(a)(2). Kazakhstan disputes these points and, in addition, argues that the act of state doctrine applies. These issues are discussed in turn below.

**B. Waiver of Immunity under FSIA**

FSIA provides that a sovereign may be sued if it has "waived its immunity either explicitly or by implication[.]" 28 U.S.C. § 1605(a)(1). World Wide claims that Kazakhstan explicitly waived its immunity in the "Pledge Agreement."

*Appendix B*

The waiver provision of FSIA is to be interpreted narrowly, and it must be clear the foreign state intended to waive its immunity. *See Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990).

**1. The Pledge Agreement**

The parties entered into the "Pledge Agreement" to secure various loans required under the management agreement. Article 19 of the "Pledge Agreement" provides for dispute resolution mechanisms. If negotiations fail, the parties have the option to arbitrate but are not required to do so. *See* Proposed Second Am.Compl., Ex. 2, art. 19.5. The waiver clause specifically indicates that the waiver is to apply to FSIA. *Id.* The dispute at hand involves all of the contracts between the parties and therefore the dispute resolution requirements of the "Pledge Agreement" are applicable here.

Defendant Kazakhstan argues that the waiver is void since the agreement is between Kazakhstan and World Wide Financial Resources, a British Virgin Islands corporation. Kazakhstan claims that since article 19.5 allows that the parties may sue in their jurisdictions, it was not on notice that it would be sued in the United States. Article 19.5 does allow that the parties may bring suit in the court of the jurisdiction of each party, but goes on to waive immunity in any jurisdiction. *See* Proposed Second Am.Comp., Ex. 2, art. 19.5. Article 19.5 concludes by stating that the waiver is intended specifically for jurisdictions in which FSIA is applicable. *Id.*

The fact that World Wide Fincorp is a British Virgin Islands company is not determinative in this case. *See Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 490, 103 S. Ct. 1962, 76 L. Ed. 2d 81 (1983) (holding that FSIA did not bar actions brought by foreign plaintiffs). The language of the waiver makes the United States the only possible jurisdiction to which it could apply. Therefore, this court holds that Kazakhstan intended to waive immunity to suit.

The finding that Kazakhstan waived its immunity to suit renders irrelevant discussion of whether or not the activities of Kazakhstan qualify as commercial activity under FSIA. However, Kazakhstan has also raised the act of state doctrine as a defense and this requires further examination.

**C. Act of State Doctrine**

The act of state doctrine bars consideration of claims when the resolution of a case turns on the legality or illegality of official action taken by a foreign sovereign in its own territory. *See W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 406, 110 S. Ct. 701, 107 L. Ed. 2d 816 (1990). The rule is connected to the domestic separation of powers and intended to avoid burdening the conduct of foreign affairs. *See W.S. Kirkpatrick & Co., Inc.*, 493 U.S. at 404, 110 S. Ct. 701. Under the doctrine, "the act within its own boundaries of one sovereign State . . . becomes . . . a rule of decision for the courts of this country." *Id.* at 406, 110 S. Ct. 701 (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 310, 38 S. Ct. 312, 62 L.Ed. 733 (1918)). The party raising the act of state defense has the burden of establishing the facts required under the doctrine. *See Riggs*

*Appendix B*

*Nat'l Corp. & Subsidiaries v. Commissioner of the I.R.S.*, 163 F.3d 1363, 1367 & n.5 (D.C. Cir. 1999) (citing *Lamb v. Phillip Morris, Inc.*, 915 F.2d 1024, 1026 & n.4 (6th Cir. 1990)). The doctrine does not demonstrate a lack of jurisdiction but rather functions as a doctrine of abstention. *Id.* (citing *In re Minister Papandreou*, 139 F.3d 247, 256 (D.C. Cir. 1998)).

Kazakhstan has raised the act of state doctrine as a defense. The defendants claim that in order to give relief this court must find invalid the denial of the export license and other governmental enactments.

Kazakhstan has demonstrated that granting World Wide relief would require a judgment on the acts of a sovereign state. World Wide repeatedly indicates that its damages were caused by the inability to obtain an export license for uranium and the nationalization of property, *See* Proposed Second Am.Compl., ¶¶ 65, 66, 76, 82. The regulations regarding the issuance of export licenses were specifically enacted by Kazakhstan in the interests of international and national security. *See* Republic of Kazakhstan's Motion to Dismiss The Am.Compl., Ex. 10. If liability were attributed to Kazakhstan for the alleged damages suffered by World Wide, Kazakhstan would be faced with a judgment that designated its denial of the export license as invalid. *See Mol, Inc. v. Peoples Republic of Bangladesh*, 572 F. Supp. 79, 85 (D. Or. 1983) (holding that denial of an export license cannot be examined under the act of state doctrine). The same is true of a judgement concerning the alleged nationalization of property. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S.

398, 433, 84 S. Ct. 923, 11 L. Ed. 2d 804 (1964) (holding that the seizure of privately owned property could not be examined because of the act of state doctrine).

World Wide claims that it only seeks investigation into the conspiracy against it. World Wide maintains that the facts here are similar to those in *W.S. Kirkpatrick*, and therefore the ruling in that case should guide the decision.

In *W.S. Kirkpatrick*, the Supreme Court considered the application of the act of state doctrine to a claim for damages under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961. *See W.S. Kirkpatrick*, 493 U.S. at 402, 110 S. Ct. 701. The plaintiff claimed that the defendant, a private corporation, had bribed Nigerian officials in order to obtain a contract. *Id.* The Court in *W.S. Kirkpatrick* held that the act of state doctrine did not apply because the validity of the contract was not at issue. *Id.* at 409, 110 S. Ct. 701.

In contrast, the validity of the contract is at issue in this case. Unlike the facts in *W.S. Kirkpatrick* the defendant here is a foreign sovereign, not a private company. To investigate the conspiracy we must examine the contracts with Nukem, since these led to the denial of World Wide's export license. These contracts were based on the internal laws and decrees of the Republic of Kazakhstan. Kazakhstan would be faced with an investigation directly concerning its governmental acts. Investigation of the claims against Kazakhstan would be in direct conflict with the ruling in *W.S. Kirkpatrick*. *See W.S. Kirkpatrick*, 493 U.S. at 406, 110 S. Ct. 701.

*Appendix B*

By way of comparison the act of state doctrine would not bar claims against Nukem because the situation would be analogous to *W.S. Kirkpatrick.* If the court allowed such damages its findings might suggest that the contract was invalid, but Kazakhstan's governmental decrees would not be directly implicated. Here however, the claim for damages is against Kazakhstan, thus involving the legality of the governmental actions. As such, this court cannot consider any of the claims against Kazakhstan or its instrumentalities due to the act of state doctrine.

**II. *Nukem***

The jurisdictional allegations against defendant Nukem, raise issues separate from the jurisdictional questions involving the other defendants. Defendant Nukem is a New York corporation with its principal place of business in Connecticut. Plaintiff World Wide asserts several grounds of jurisdiction. First, that Nukem satisfies the D.C. long arm statute and meets the requirements of due process. Second, that the Court has jurisdiction under the Clayton Act, 28 U.S.C. § 1391. Third, that jurisdiction is proper under the Federal Rico Statute, 18 U.S.C. § 1965, and finally that the court has conspiracy jurisdiction. The court finds these arguments without merit.

As an initial matter, plaintiff World Wide raises few allegations in the amended complaint specifically against defendant Nukem. *See* Amended Complaint ¶ 6 (alleging personal jurisdiction over Nukem due to meetings at the Republic of Kazakhstan Embassy), ¶ 13 (alleging that Nukem conducts business in the District of Columbia by meeting

with various officials of the U.S. and Kazakhstan). In various responses filed by World Wide, and the proposed Second Am.Comp., World Wide has repeated these allegations and added five new contacts with the District of Columbia. World Wide alleges that:

1. Nukem publishes advertising in the district.

2. Subscribers to Nukem's trade publication reside in the district.

3. Nukem is a member of various trade organizations which hold conferences in the District of Columbia.

4. The American Uzbekistan Chamber of Commerce was incorporated by Nukem and Nukem serves on the board of directors for the Chamber of Commerce in the district.

5. Nukem, represented by Mr. James C. Cornell, signed the U.S.—Russia Highly Enriched Uranium agreement.

For the reasons discussed below, these contacts do not give this court jurisdiction over Nukem.

**A. *The "Government Contacts" Exception to Personal Jurisdiction***

The "government contacts" exception excludes from jurisdictional consideration a defendant's contacts with federal instrumentalities. *See Mallinckrodt Med. Inc. v. Sonus Pharm., Corp.*, 989 F. Supp. 265, 271 (D.D.C. 1998). This exception has arisen from the District of Columbia's unique

character as the home of the federal government. *Id.* Courts have construed the exception to extend to non-resident contact with trade associations located with the District of Columbia. *See Investment Co. Inst. v. United States*, 550 F. Supp. 1213 (D.D.C. 1982).

Application of this exception to Nukem ends consideration of several jurisdictional allegations. Any of the meetings with governmental officials would be excluded under the doctrine. *See Mallinckrodt*, 989 F. Supp. at 271. Courts have refused to extend this exception to embassy meetings when the non-resident defendant was pursuing a proprietary interest. *See Dooley v. United Technologies Corp.*, 786 F. Supp. 65, 74-76 (D.D.C. 1992). Therefore, under the government contacts exception, this Court excludes from consideration meetings with governmental officials in the District of Columbia, and the signing of the bi-lateral agreement on uranium. However, the alleged meetings at the Republic of Kazakhstan Embassy will be considered.

Nukem's membership in a trade organization also qualifies as "government contacts", under *Investment Co. Institute v. United States*, 550 F. Supp. 1213 (D.D.C. 1982). The Court in that case noted, "[I]t would surely come as a surprise to the members of the many trade associations having offices here that their membership counted as intrastate business for jurisdictional purposes." *Investment Co. Institute v. U.S.*, 550 F. Supp. 1213, 1217 & n.6 (D.D.C. 1982). The same applies here.

*Appendix B*

**B. D.C. Long Arm Statute**

World Wide has invoked the "transacting business" clause of the D.C. Long Arm statute, D.C. Code § 13-423(b). To obtain personal jurisdiction over a non-resident defendant under § 13-423(b), a plaintiff must assert three requirements with specificity. First, the non-resident defendant must have "transacted business" within the district. Second, the contact must give rise to the claim. Third, the assertion must be consistent with due process considerations.

**1. Transacting Business**

A corporation transacts business within the District only if the business is of a "substantial character". *See Armco Steel Co., L.P. v. CSX Corp.*, 790 F. Supp. 311, 320 (D.D.C. 1991) (citing *Chrysler Corp. v. General Motors Corp.*, 589 F. Supp. 1182, 1195 (D.D.C. 1984)). Trade organizations representing business interests have been found to lack the required level of involvement. *See Armco*, 790 F. Supp. at 320. Lacking a showing that the contact was "integral to the conduct of . . . business," the contact failed to establish that the defendant had transacted business within the district. *Id.*

The American Uzbekistan Chamber of Commerce seems to be the type of trade organization considered in *Armco.* World Wide alleges that the Chamber of Commerce is a "non-profit encouraging international trade with Central Asia." *See* proposed Second Am.Compl. ¶ 10e. This generalized statement does not indicate that the organization is a contact of "substantial character" for Nukem. *Id.* The involvement of Nukem in the Chamber of Commerce, therefore, fails to satisfy the transacting business requirement.

*Appendix B*

**2. "Arising From"**

D.C. Code Ann. § 13-423(b) requires a significant connection between the claim and alleged contact with the forum. This court will closely adhere to this "arising from" requirement. *See Coalition on Sensible Transp., Inc. v. Dole*, 631 F. Supp. 1382 (D.D.C. 1986).

The remaining World Wide allegations fail to demonstrate a sufficient connection between the injury and the contacts to meet the "arising from" requirement.

World Wide alleges that meetings contributing to the conspiracy took place at the Kazakhstan Embassy. World Wide simply states that there were several such meetings without giving specific dates. *See* Proposed Second Am. Compl., ¶ 10. In earlier pleadings, World Wide had alleged that meetings took place in December 1997. World Wide claims that the injury occurred either on April 30, 1997 or May 6, 1997, when Kazakhstan indicated that no export license would be granted. The contact therefore took place after the alleged injury occurred. The Long Arm statute, D.C. Code § 13-423(b), requires that the claim arise from the contacts alleged. It would be impossible for the injury to arise from a contact occurring months later. Therefore, this court cannot exercise personal jurisdiction over Nukem on the basis of the alleged meetings at the embassy.

The other contacts alleged by World Wide also fail the "arising from" test. Publishing advertisements or mailing trade magazines in the forum might not even provide the needed minimum contacts. *See Volkswagen De Mexico v.*

*Germanischer Lloyd*, 768 F. Supp. 1023, (S.D.N.Y. 1991) (holding that advertisements that reach the district do not establish personal jurisdiction). Even granting that these contacts meet the requirements of due process they cannot meet the requirements under § 13-423(b). The presence of subscribers to a trade magazine cannot be connected to the creation of a conspiracy to breach a contract that was signed and performed in Kazakhstan. The same is true of advertisements in area newspapers. The alleged injury therefore cannot arise from these contacts.

For the reasons above this court lacks personal jurisdiction over Nukem under the D.C. Long Arm Statute.

**C. Anti-trust Claims as an Alternative Basis of Jurisdiction**

The claims under the Sherman and Clayton Acts are new additions to World Wide's allegations, appearing for the first time in the Proposed Second Amended Complaint. World Wide cites these acts as an alternative grounds for jurisdiction. Presumably, although it is not expressly indicated, World Wide hopes that the national service provisions of the Clayton Act will give this court jurisdiction over Nukem. This approach has been expressly rejected in recent decisions. *See GTE New Media Serv. Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. 2000). In *GTE*, the defendant argued that the nation-wide service provisions of the Clayton Act provided a basis for personal jurisdiction in every district of the United States. *See GTE*, 199 F.3d at 1350. The court found that the Clayton act required proper venue in order to satisfy jurisdictional requirements. *Id.*

*Appendix B*

The venue analysis requires that this court perform the local contacts test under the applicable long-arm statute. *See In re Vitamins Antitrust Litigation*, 94 F. Supp. 2d 26, 31 (D.D.C. 2000). As shown above, the allegations by World Wide do not satisfy the requirements of the long-arm provision, and therefore, this court does not have jurisdiction under the Clayton Act.

**D. RICO as an alternative basis of Jurisdiction**

Plaintiffs also contend that jurisdiction may be based on the Federal RICO statute, 18 U.S.C. § 1965. A court in this jurisdiction has held that the RICO service provision does provide for jurisdiction based on a national contacts test as opposed to a local contacts test. *See Dooley v. United Technologies Corp.*, 786 F. Supp. 65, 71 (D.D.C. 1992). This ruling recognized that other jurisdictions have used a national contacts test. *See Omni Video Games, Inc. v. Wing Co., Ltd.*, 754 F. Supp. 261, 263 (D.R.I. 1991); *University Savings Assn. v. Bank of New Haven*, 765 F. Supp. 35, 36 (D. Conn. 1991); *American Trade Partners L.P. v. A-1 Int'l Importing Enter. Ltd.*, 755 F. Supp. 1292, 1302 (E.D. Pa. 1990). The Court in *Dooley* also recognized that this circuit has not directly addressed the issue. *See Dooley*, 786 F. Supp. at 71.

This court declines to follow *Dooley*. In *United States v. Dyncorp, Inc.*, 924 F. Supp. 292, 297 (D.D.C. 1996), the court conducted a minimum contacts due process analysis despite the nationwide service provision in the False Claims Act. It is true that each statute must be interpreted separately. *See Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 120 S. Ct. 1331, 1339, 146 L. Ed. 2d 171 (2000)

("analysis of special venue provisions must be specific to the statute"). However, a comparison of the Clayton Act service provisions and the RICO statute provisions does show a substantial similarity. *Compare* 18 U.S.C. § 1965(a), (d) *with* 28 U.S.C. § 1391(b), (c). The ruling in this circuit in *GTE New Media Services*, 199 F.3d 1343 (D.C. Cir. 2000), on the Clayton Act postdates *Dooley*, and suggests that a national contacts test might not apply. In addition, there is strong support to reject nationwide jurisdiction in the Second Circuit. *See PT United Can Co. Ltd. v. Crown Cork & Seal Co., Inc.*, 138 F.3d 65, 70-71 (2nd Cir. 1998).

As the Second Circuit noted, the service provisions of the RICO statute must be read together in order to be coherent. *See PT United Can Co., supra*, 138 F.3d at 70. First, 1965(a) gives personal jurisdiction over defendants when they reside, have an agent, or transact affairs in the district. This is analogous to having minimum contacts within the district. Then 1965(b) provides for nationwide jurisdiction over *other parties* not residing in the district. 1965(c) provides for service of subpoenas. Finally, 1965(d) provides for nationwide service of "all other process". This clause should not invalidate the division in (a) and (b) between resident and non-resident defendants. The statute seems to provide for nationwide jurisdiction only when one of the defendants has minimum contacts with the forum. This court rejects the notion that the federal RICO statute would provide a basis for nation wide jurisdiction. Since none of the defendants are subject to personal jurisdiction in the District of Columbia the RICO statute does not allow this court to assert jurisdiction.

*Appendix B*

**E. Conspiracy Jurisdiction**

Finally, World Wide alleges that Nukem is amenable to the court's power under conspiracy jurisdiction. Most courts utilize conspiracy jurisdiction warily and require that a plaintiff "plead with particularity the conspiracy as well as the overt acts within the forum." *See Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1031 (D.C. Cir. 1997). For conspiracy jurisdiction to function there must be a substantial act within the forum. *See Jungquist, supra*, 115 F.3d at 1031.

World Wide names as Nukem's co-conspirators the embassy officials. The only overt act alleged with particularity by World Wide involving the conspiracy is the meeting at the embassy. World Wide fails to explain how this meeting taking place after the crucial incidents had occurred could have been used to "plan" the conspiracy. All of the other acts of the conspiracy took place outside of the District of Columbia. Consequently, a denial of personal jurisdiction under this theory is warranted.

***III. Conclusion***

For the reasons set forth above the proposed second amended complaint would not survive a motion to dismiss. Therefore, the Proposed Second Amended Complaint is futile. Moreover, the defendants' motions to dismiss the Amended Complaint shall be granted in a separate order filed this date.

*Appendix B*

**ORDER**

Upon consideration of the parties' motions, their oppositions and replies, and the entire record in this case, and for the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the plaintiff's motion for leave to File Second Amended Complaint [54-1] is DENIED, and

FURTHER ORDERED that Republic of Kazakhstan, State Committee for the Republic of Kazakhstan, and Kazatomprom's motion to dismiss under the act of state doctrine is GRANTED [21-1], and that defendant Nukem's motion to dismiss for lack of personal jurisdiction is GRANTED [27-1].

ORDERED that Kazakhstan's motion to dismiss for lack of personal jurisdiction [22-1] is DENIED as moot. Kazakhstan's motion to dismiss for failure to state a claim [23-1] is DENIED as moot.

Kazakhstan's motion to stay proceedings and compel arbitration [24-2] is DENIED.

Kazatomprom's motion for joinder of motions [25-1] is DENIED as moot.

Kazatomprom's motion to dismiss [26-1] under F.R.C.P. 12(b)(1), (2) are DENIED as moot.

*Appendix B*

Nukem's motion to file confidential material under seal [29-1] is GRANTED.

Nuclear Fuel Resources motion to strike affidavit [33-1] is DENIED as moot.

World Wide Minerals motion for leave to take jurisdictional discovery [34-1] is DENIED.

Nukem's motion to seal confidential material [46-1] is GRANTED.

World Wide's motion [53-1] to remove from public record and place under seal the plaintiff's motion to strike submission is GRANTED.

This case now stands DISMISSED.

SO ORDERED.

## APPENDIX C — STATUTES INVOLVED

### 28 U.S.C. § 1330

Section 1330. Actions against foreign states

**(a)** The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

* * *

*Appendix C*

## 28 U.S.C. § 1605

Section 1605. General exceptions to the jurisdictional immunity of a foreign state

**(a)** A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

**(1)** in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

**(2)** in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

* * * *